No. 17308

United States Court of Appeals
for the Ninth Circuit

RICHARD S. SIMPSON,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 282)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 5/12/61—Printed 6/6/61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, omissions appearing in the original certified record is printed and omitted herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California

No. 37344

RICHARD S. SIMPSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

COMPLAINT FOR AN INJUNCTION

The above-named plaintiff complains of the above-named defendants for and for cause of action alleges:

I.

Parties

1. Plaintiff has been the lessee and operator of a Union Oil Company service station located at 4010 E. Ventura Avenue, Fresno, California. He has been the lessee at said station for two years last past.

2. Defendant, Union Oil Company of California (hereafter referred to as Union Oil Company), is a corporation organized and existing under the laws of the State of California. It has an office and a place of business located at 425 First Street, San Francisco, California.

II.

Jurisdiction and Venue

3. The complaint is filed and these proceedings are instituted against the above-named defendant under Sections 15 and 26 of Title 15 U.S.C.A., being a part of the Act of Congress of July 2, 1890, c. 649, 26 Stat. 209, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies, commonly known as the Sherman and Clayton Act." Said Act, 15 U.S.C. 26, gives this Court jurisdiction to grant injunctive relief against threatened loss or damage by violation of the antitrust laws.

III.

Interstate Trade and Commerce

4. Defendant Union Oil Company is a vast corporation, doing business in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, Nevada and in the Territories of Alaska and Hawaii. It has assets in excess of three hundred million dollars. It drills, produces and imports vast quantities of crude oil; said drilling, production and importing taking place in trade and commerce between the several states and in foreign commerce.

5. Defendant Union Oil Company operates oil and petroleum pipelines in the States of California and Montana and Washington. Said defendant owns or operates or leases ships designed to transport its crude oil and products along the seacoast of the west coast and in foreign commerce.

6. Defendant Union Oil Company operates refineries in the States of California and Montana which refine oil into gasoline and other petroleum products. Defendant Union Oil Company operates at least four refineries in the United States; one at Wilmington, California; one at Cut Bank, Montana; one at Seattle, Washington, and one at Oleum, California.

7. Defendant Union Oil Company is a wholesale distributor of petroleum products. It owns or operates approximately 502 bulk plant stations located throughout the eight western states above named. A substantial amount of sales are made by Union Oil Company out of said bulk plants to wholesalers, retailers and to its own retail outlets; said customers being located in the eight western states, above.

8. Defendant Union Oil Company owns, operates or leases a vast number of gasoline transports in the eight western states, above, which pick up petroleum products at transport terminals and deliver the petroleum products of Union Oil Company to large storage retail outlets.

9. In addition to the aforesaid activities of defendant Union Oil Company in the production, refining and delivery of oil and petroleum products, said defendant is also a large retailer of petroleum products in the eight western states. It has directly owned approximately 52 retail stations in the eight western states.

10. Defendant Union Oil Company has obtained

and exercises effective control over the operations of approximately 4,733 service stations in the eight western states, which sell its refined petroleum products to consumers. These retail outlets have been operated by independent businessmen who have purchased refined petroleum products from said defendant for resale to the consumers. Most of these service stations are leased or subleased by Union Oil Company to independent operators. All of these operators have entered into supply contracts with the said defendant. By means of various provisions in these leases, subleases, and supply contracts, and by means of a system of policing which subjects the business operations of these independent service station operators to minute inspection and surveillance, the said defendant completely dominates and controls the manner in which these independent businessmen operate their retail outlets. The defendant Union Oil Company requires the independent operators who sell its refined petroleum products to purchase their requirements exclusively from said defendant; and not to handle or sell the petroleum products of others. Defendant Union Oil Company controls the price at which these independent operators resell gasoline and other petroleum products. Defendant Union Oil Company directly controls millions of dollars of petroleum sales in the eight western states.

11. The practices hereinafter alleged as in violation of the antitrust laws directly affect said retail activities in the eight western states.

12. As of 1957, the total volume of business of Union Oil Company was $436,731,000.00 and it marketed 60,404,000 barrels of petroleum products which were in or affected interstate and foreign trade and commerce.

IV.

Offenses Charged

13. Beginning on or about May, 1955, and continuing thereafter up to and including the date of the filing of this Complaint, the defendant Union Oil Company has and now is engaged in the effectuating of contracts which restrain unreasonably, and pursuant to said contracts has in fact unreasonably restrained interstate trade and commerce, and has attempted to and intended to monopolize the sale of gasoline in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act. Defendant threatens to continue and will continue the violation of said sections unless the relief hereinafter prayed for in this Complaint is granted.

14. The aforesaid contracts attempt to monopolize and the actual monopolization has resulted and does result from entering into leases or subleases with thousands of otherwise independent service station operators which condition that said independent businessmen obtain all their petroleum products from the defendant Union Oil Company and to charge the public prices for gasoline as fixed by said defendant.

15. Prior to May, 1955, the defendant Union Oil Company did not attempt to directly fix the prices of refined gasoline by its lessees by means of an express written document. Said retail price fixing was done indirectly by employees or agents of said defendant who constantly watched the pricing policies of thousands of independent lessees or sublessees of said defendant and who carried out a program of having said independent businessmen abide by the prices fixed by the Union Oil Company.

16. Starting on or about May, 1955, the defendant Union Oil Company created a contract known as the "Retail Dealer Consignment Agreement." Said agreement is attached hereto and incorporated herein as Exhibit "A." This contract was forced by said defendant on independent service station lessees who otherwise are responsible to themselves for the operation of said service stations. Said agreement, however, directly fixes the retail prices that these thousands of otherwise independent service station operators can charge on the resale of gasoline at the prices set by the Union Oil Company. Existing independent lessees were forced to sign said consignment agreements on fear of losing their leases, and new independent lessees were unable to obtain leases from defendant Union Oil Company without submitting to signing the new "Retail Dealer Consignment Agreement."

V.

Effect of the Retail Dealer Consignment Agreement

17. The aforesaid contract and plans of the defendant had and has the following effects on interstate trade and commerce:

a. It prevents the putative independent service station operators from establishing their own retail gasoline prices in the eight western states.

b. It prevents the consuming public from obtaining the benefits of price competition among putative competitive independent retail operators who sell the defendants gasoline for resale.

c. It prevents price competition between putative independent retailers of gasoline in competition with the competitors of Union Oil Company.

d. It replaces the independence of approximately four thousand petroleum retailers by the forced acceptance of a "consignee" relationship as to gasoline alone.

e. The consignment contract is enforced by scare tactics and coercive devices which seriously interfere with the happiness and liberty of otherwise independent businessmen.

VI.

Injury to Plaintiff

18. Plaintiff has been connected with the wholesaling and retailing of gasoline since 1948. As of

May 23, 1955, he entered into a lease with Union Oil Company for the right to operate property held in fee by Union Oil Company at 4010 E. Ventura Avenue, Fresno, California. At the time of the entry into said lease said service station had free and open access to the public. Approximately a year ago said service station was on the frontage of a highway under heavy construction. Said lease of May 23, 1955, continued for one year until May 22, 1957.

19. At the time of the expiration of said lease, it was known that the plaintiff would be expected to operate his station under serious and adverse conditions under which the station was difficult of access by the consuming public. Said plaintiff, however, realizing the difficulties of said operation, but in the expectation that his efforts and labors under such adverse circumstances would be appreciated and rewarded by said defendant, entered into a lease on April 2, 1957, effective May 23, 1957, for an additional year, terminating on the 22nd day of May, 1958.

20. As a condition to the above leases defendant Union Oil Company required that plaintiff sign the said Retail Dealer Consignment Agreement, attached hereto as Exhibit "A." Plaintiff protested the signing of said agreement, but was informed, in effect, that he could not obtain a lease without signing said consignment agreement.

VII.

Termination of Lease

21. There are directly competitive to the service station leased by plaintiff, three service stations which sell the product of Standard Oil Company, Tidewater-Associated Oil Company, and Richfield Oil Corporation.

22. On or about March, 1958, these competitive service stations lowered the price of their regular gasoline to 27.9c from 34.9c. In order to meet this competition, plaintiff, after requesting authorization from defendant which was refused, lowered his price to 27.9c. The stipulated consignment price, however, had been set at 29.9c by defendant.

23. Approximately a week later, Mr. W. S. Christopher, Division Sales Manager, Fresno Area, called on plaintiff and told him that he was breaking the consignment agreement and ordered his prices up to the authorized consignment price of 29.9c, and informed plaintiff that he would do everything in his power to cause plaintiff to conform to said prices. He implied by words and action that plaintiff's lease would not be renewed unless he raised his prices to 29.9c.

24. Following said conversation, plaintiff refused to abide by the commands of said Christopher, and persisted in setting his own retail prices.

On or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant Union Oil Company.

25. Plaintiff has requested that he be allowed to continue to lease said property at 4010 E. Ventura Avenue, as is customary and usual with the defendant Union Oil Company with lessees who have been in possession of a lease for a prior period and have successfully leased the station.

26. Plaintiff has successfully operated said service station, but his lease will not be renewed and his present lease will expire at midnight, May 22, 1958. As best known to this plaintiff, the only reason known to plaintiff for the refusal of said defendant to renew his lease is that he refused to allow defendant to fix his retail prices as set by defendant under its Retail Dealer's Consignment Agreement, Exhibit "A" hereto.

Wherefore, plaintiff prays as follows:

1. That summons issue to the defendant commanding it to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the aforesaid Retail Dealer Consignment Agreement, Exhibit "A," hereto, be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

3. That the Court enjoin the defendant from the further effectuation of said agreements on independent service station operators.

4. That the Court issue a temporary restraining order preventing the defendant Union Oil Company from cancelling the lease of the plaintiff, at 4010 E. Ventura Avenue, Fresno, California, and/or preventing said Union Oil Company from leasing said service station to anyone other than plaintiff in the above-entitled action.

5. That the Court issue a preliminary injunction preventing the Union Oil Company from cancelling the lease of the plaintiff at 4010 E. Ventura Avenue, Fresno, California, until the determination of the merits of this controversy and/or preventing said Union Oil Company from leasing said service station to anyone other than plaintiff in the above-entitled action.

6. That the Court issue a permanent injunction preventing said Union Oil Company from cancelling the lease of the plaintiff at 4010 E. Ventura Avenue, Fresno, California, for a reasonable period of time following the termination of this proceeding, and/or preventing said Union Oil Company from leasing said service station to anyone other than plaintiff in the above-entitled action for a reasonable period of time following the termination of this proceeding.

7. That the plaintiff recover his costs and that reasonable attorney fees be awarded by the Court.

8. For such other and further relief as the Court may deem proper.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

EXHIBIT A

[Exhibit A attached to the foregoing is identical to Exhibit A attached to the Answer of Defendant to Amended Complaint.]

Duly verified.

[Endorsed]: Filed May 21, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF W. S. CHRISTOPHER

State of California,
City and County of San Francisco—ss.

W. S. Christopher, being first duly sworn, deposes and says:

I am now and continuously since 1932 have been an employee of Union Oil Company of California, hereinafter called "Union." I reside at 116 East Griffith Way, Fresno, California. Since October 1, 1957, I have been the Division Manager in Fresno, California.

From November 16, 1953, until October 1, 1957, I was District Sales Manager, Retail, in San Francisco. From October 1, 1952, until November 16, 1953, I was District Sales Manager in Salem, Oregon. From July 1, 1947, to October 1, 1952, I was District Sales Manager in Fresno. Prior to that time I held various positions including District

Representative, Area Manager, Retail Representative, Service Station Superintendent and Resident Manager. During my 26 years with the Union Oil Company I have spent 11 years in the Fresno area, and I have personally known, and observed the operations of, between two and three thousand Union service station dealers.

During the two years that plaintiff was the lessee of said service station, the amount of gasoline sold from said station averaged approximately 12,500 gallons per month.

Attached hereto and marked Exhibit A is a map of the Fresno marketing area on which are marked most of the service stations in the area. The station formerly leased to plaintiff is depicted as an orange box within the red circle in the lower center portion of the map. Attached hereto and marked Exhibit B are true copies of pages 308 through 314 of the classified section of the Fresno telephone directory which gives additional information respecting said service stations.

In the area shown by the map there are at least 246 service stations, 26 of which (10.6%) are Union stations, i.e., display the colors and emblems of the Union Oil Company of California and from which are sold branded products of the defendant. The monthly volume of these 26 Union stations is approximately 354,000 gallons per month.

In the same area there are at a minimum: 21 stations selling the branded products of the Shell

Oil Company; 28 stations selling the branded products of General Petroleum Corporation; 36 stations selling the branded products of Standard Oil Company of California (8 of which are operated by Standard Stations, Inc., and 28 of which are Chevron dealer stations); 32 stations selling the branded products of Tidewater Oil Company; 22 stations selling the branded products of The Texas Company; 20 stations selling the branded products of Richfield Oil Corporation, and 61 stations selling other brands.

I have sufficient experience in the service station business to estimate, with a maximum error of 15%, the average volume of gasoline sold at a service station from observing its appearance, construction, location, the traffic routes, customer traffic, services rendered, hours operated and other relevant factors. From actual observation of the service stations in the Fresno marketing area, I estimate that 3,600,000 gallons of gasoline per month are sold from said 246 stations monthly, broken down as follows:

	Number of Stations	Monthly Gallonage
Standard Stations Inc. and Chevron	36	650,000
Tidewater	32	450,000
General Petroleum	28	385,000
Union	26	355,000
The Texas Company	22	300,000
Shell Oil Company	21	390,000
Richfield	20	270,000
Others	61	800,000

I estimate the quantity of gasoline sold from Union stations in the Fresno area to be approximately 10% of the total volume of gasoline sold from all service stations located in that area. I estimate the quantity of gasoline sold through the Union station located at 4010 East Ventura Avenue, Fresno, to be approximately ⅓ of 1% and certainly no more than ½ of 1% of the total volume of gasoline sold in the Fresno marketing area.

/s/ W. S. CHRISTOPHER.

Subscribed and sworn to before me this 26th day of May, 1958.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 14, 1958.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF R. R. PINOCHI

State of California,
City and County of San Francisco—ss.

R. R. Pinochi, being first duly sworn, deposes and says:

I reside at 621 Irving Avenue, Monterey, California.

During the period of June, 1935, through May, 1957, I was an employee of the Union Oil Company of California, assigned to Fresno, California, as a retail representative.

In the course of my duties as such, and about April 27, 1956, I handed to Richard S. Simpson at the service station located at 4010 East Ventura Avenue, Fresno, California, a lease, a true copy of which is attached hereto and marked Exhibit A, and a retail gasoline dealer consignment agreement, a copy of which is attached hereto and marked Exhibit B. Simpson signed each of said documents in my presence.

About September 20, 1956, I handed to Simpson, at the Union service station located at 4010 East Ventura Avenue, Fresno, California, a letter of which Exhibit C hereto is a true copy. Simpson signed said letter in my presence.

About April 9, 1957, I handed to Simpson, at the Union service station located at 4010 East Ventura Avenue, Fresno, California, a lease, a true copy of which is attached hereto and marked Exhibit D. Simpson signed said lease in my presence.

I did not tell Simpson that he had to sign any of the foregoing papers and did nothing to compel him to sign anything.

The leases of which Exhibits A and D hereto are true copies are the only leases which ever existed between Simpson and the Union Oil Company of California relating to said service station. Neither

of said leases, nor consignment agreement, nor any other contract which ever existed between Simpson and Union Oil Company of California respecting said service station, obligated Simpson to buy any petroleum products sold by Union, or obligated Simpson to take delivery of any gasoline from the Union Oil Company of California, or precluded him from handling or selling petroleum products of whomever he chose.

/s/ R. R. PINOCHI.

Subscribed and sworn to before me this 26th day of May, 1958.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 14, 1958.

EXHIBIT A

150-4089.

Service Station Lease

This Lease, made this 27th day of April, 1956, by and between Union Oil Company of California, a corporation, Lessor, and Richard S. Simpson, dba Simpson's Union Service, Lessee.

Witnesseth:

1. Property: Lessor does hereby lease to Lessee that certain real property situate in the City of

Fresno, County of Fresno, State of California, described as follows: Union Oil Service Station No. 4089, Southeast corner Ventura and Tenth Streets, together with the buildings, improvements and equipment thereon consisting of the following receipt of which in good condition being hereby acknowledged:

1—Service station building(s) with fixtures.
5—Coxwells without hoses, bibbs or inflators.
1—7,500 gallon underground storage tank(s).
1—5,000 gallon underground storage tank(s).
1—550 gallon underground storage tank(s).
0—..... gallon underground storage tank(s).
1—Single post hydraulic hoist.
2—Pedestal type steel cash box(s).
4—Computing service station pumps.
1—In-A-Floor safe.
2—Floodlight poles with fixtures.
1—1½ HP air compressor.
1—Steel work bench with tool panel.
1—Fire extinguisher(s).
3—Salesroom display cabinets.
8—30-gallon hiboys.
2—Triton display cart(s).
1—Service Station Management Manual.
1—Minute Man Manual.

Such real and personal property is collectively hereinafter sometimes referred to as "the service station."

2. Term: The term of this lease shall commence the 23rd day of May, 1956, and end the 22nd day

of May, 1957, subject to termination by Lessee at any time on not less than thirty (30) days' written notice to Lessor. Lessor will be under no obligation to extend or renew any lease under which it may hold the service station and in the event of any termination of such lease, this lease shall terminate forthwith.

3. Rental: Lessee agrees to pay Lessor as rental for said service station at Lessor's option either (a) a sum equivalent to Two Cents (2c) per gallon for each gallon of gasoline delivered to the service station or, at Lessor's option, sold therefrom (hereinafter referred to as "gallonage rental") plus Ten Dollars ($10.00) per calendar month (hereinafter referred to as "fixed monthly rental") or (b) the sum of Two Hundred Eighty-four Dollars ($284) per calendar month (hereinafter referred to as "flat monthly rental"). Lessor may exercise its option to have rentals paid under either (a) or (b) above at any time and from time to time upon not less than thirty (30) days' written notice to Lessee. In the absence of such notice rentals shall be paid in accordance with (a) above.

If this lease should commence or end other than on the first or last day, respectively, of a calendar month, the fixed monthly rental or the flat monthly rental for such month shall be prorated in the same proportion that the number of days in such month for which this lease is effective bear to the full calendar month.

Lessee shall keep on said premises accurate records of all deliveries of gasoline to and from the

service station which shall be available for Lessor's inspection and verification at any and all reasonable times. Upon demand, Lessee shall furnish Lessor with a signed sworn statement of the number of gallons of gasoline delivered to and from the service station during any calendar month. If and as required by Lessor, Lessee agrees to keep and supply Lessor with a true and accurate record of the gross revenue derived from all sales of petroleum products, merchandise and services from or on the service station. Said records or statements shall be made monthly in duplicate upon forms supplied by Lessor and sworn to before a Notary Public on or before the fifth (5th) day of the following calendar month and immediately mailed to Lessor at 425 First Street, San Francisco 20, California, postage prepaid. Gallonage rental shall be paid as, when and in the manner from time to time specified by Lessor, and fixed monthly rental shall be paid on or before the twentieth (20th) day of the calendar month next succeeding that to which it applies, and the flat monthly rental shall be paid in advance on or before the first (1st) day of the calendar month to which it applies.

4. Possession. Said service station shall be used for the purpose of opening a first class motor vehicle service station and for the sale of gasoline, lubricating oil, greases, automobile tires, tubes, batteries, automotive accessories, specialties and other products customarily handled and sold in connection with the conduct of a motor vehicle service station.

The service station shall not be used for any other purpose without Lessor's prior written permission, except to the extent that it is being used for other purposes on the date of this lease.

5. Hours of Operation: Lessee agrees to keep the service station open for business and properly lighted not less than 16 hours per day every day during the months of January through December, and not less than .. hours per day during the months of .....

6. Maintenance and Repairs: Lessee will keep the service station in good condition and repair and free of weeds, debris and rubbish, and will repair or replace any damage or destruction resulting from causes within Lessee's reasonable control. In the event Lessee should fail to do so, Lessor may, at its option, clean or paint the service station or repair such damage or destruction and Lessee shall pay Lessor the cost thereof upon demand. Lessor may, at its option, repair or replace at its expense any damage or destruction resulting from causes beyond the control of Lessee. Except as hereinabove specifically provided, Lessee shall make no additions, improvements, alterations or changes in the service station or any part thereof without Lessor's prior written consent. Lessee will return the premises upon any termination of this lease in as good condition as received, except for reasonable wear and tear and damage or destruction resulting from causes beyond Lessee's reasonable control. Lessor shall have the right to inspect the premises at all

reasonable times and to enter thereon for the purposes herein set forth.

Lessee will not permit or suffer any liens, attachments, judgments or encumbrances of any kind or nature to be levied or enforced against the premises or the buildings, improvements or equipment thereon or on Lessee's interest hereunder or on Lessee's products on said premises. In the event of Lessee's failure in this regard, Lessor may pay the cost of removing any such lien, attachment, judgment or encumbrance, and Lessee will reimburse Lessor therefor upon demand.

7. Taxes and Operating Expenses: Lessee shall pay all taxes on the products, property and improvements of Lessee on the service station. Lessee will conduct its operation in strict compliance with all laws, ordinances and regulations of governmental authorities, and observe all rules of any common-carrier delivering products and pay all license fees required for Lessee's operations and all occupational business, excise or other taxes levied or imposed upon Lessee's operations or upon the handling, storage, withdrawal, distribution, sale or delivery of products handled on the service station and will pay all costs of handling, storing, distributing, and selling products handled and sold by Lessee, and all water, gas, heat and electricity or other service used in Lessee's operations. Lessee shall be exclusively liable for payment of any and all premiums, contributions and taxes for Workmen's Compensation insurance, unemployment in-

surance, old age benefits, annuities and retirement benefits now or hereafter imposed by or pursuant to any governmental law or regulation which are measured by the wages, salaries or remuneration paid to Lessee's employees.

8. Rental Abatement: Should a substantial portion of Lessor's improvements be damaged or detroyed so as to render the service station unusable for service station operations by reason of any cause beyond the control of Lessee, Lessor may terminate this lease or repair or replace such improvements and shall make such election known to Lessee within thirty (30) days after notice of such damage or destruction. Should Lessor elect to repair or replace such improvements, then the flat monthly rental shall be abated during the period of such repairs or replacement. Rental shall not be abated during any period of repairs or replacements necessitated by Lessee's negligence or by causes within Lessee's reasonable control.

9. Termination by Lessor: Lessor may at all times enter upon the service station to view and inspect the same. If Lessee fails to pay rent when due or make any reimbursements as herein provided within five (5) days after demand therefor by Lessor, Lessor may elect to terminate this lease and take possession of the service station. If Lessee should default in the performance of any of its obligations hereunder other than payment of rent and shall fail to remedy such default within fifteen (15) days after notice from Lessor, Lessor may

elect to terminate this lease and take possession of the premises. Should bankruptcy or insolvency proceedings under the laws of the United States or any state be instituted by or against Lessee, or should Lessee fail to secure the release of any lien, attachment, execution or encumbrance against the service station or Lessee's interest hereunder within five (5) days after levy thereof, or should Lessee assign this lease or any part thereof or attempt to sublet any portion of the premises, then Lessor may immediately and without prior notice terminate this lease and take possession of the service station. No such termination shall relieve Lessee of responsibility for liabilities occurring prior to termination.

10. Indemnity: Lessor shall not be responsible for any damage to property or for injury to or death of any person arising out of Lessee's operation or use of the premises and Lessee agrees to indemnify and save Lessor harmless therefrom. Lessee further agrees to carry public liability and property damage insurance in amounts and with insurance carriers satisfactory to Lessor, and supply Lessor with satisfactory evidence thereof.

11. Notice: Any notices as provided herein may be given to Lessee by delivery in person or by registered mail addressed to Lessee upon or at the above-demised premises, and any notices hereunder may be given to Lessor by registered mail addressed to it at 425 First Street, San Francisco 20, California.

12. Good Faith Deposit: Lessor hereby acknowledges receipt of the sum of Fifty Dollars ($50.00),

representing Good Faith Deposit, made by Lessee, and it agrees to return the amount to Lessee upon expiration or sooner termination of this lease, less any moneys due Lessor hereunder by Lessee, at such expiration or sooner termination.

13. Cancellation of Previous Agreements and Modifications: This lease cancels and supersedes any lease or other agreement of prior date between the parties hereto with reference to the possession of the demised premises and covers all the covenants, stipulations and provisions agreed upon by the parties hereto, and no employee, agent or representative of Lessor has authority to change, modify or alter the terms hereof, except by written instrument executed upon and with same authority as this lease, and neither party is nor shall be bound by any inducement, statement, representation, promise or agreement not in conformity herewith.

In Witness Whereof the parties hereto have caused this lease to be executed the day and year first hereinabove written.

UNION OIL COMPANY OF CALIFORNIA,

By /s/ W. S. CHRISTOPHER,
District Sales Manager,
Lessor.

/s/ RICHARD S. SIMPSON,
Lessee.

EXHIBITS B AND C

[Exhibits B and C attached to the foregoing are identical to Exhibit A attached to the Answer of Defendant to Amended Complaint.]

EXHIBIT D

150-4089.

Service Station Lease

This Lease, made this 9th day of April, 1957, by and between Union Oil Company of California, a corporation, Lessor, and Richard S. Simpson, dba "Simpson's Union Service," Lessee,

Witnesseth:

1. Property: Lessor does hereby lease to Lessee that certain real property, situate in the City of Fresno, County of Fresno, State of California, described as follows: Union Oil Service Station No. 4089, Southeast corner Ventura and Tenth Streets, together with the buildings, improvements and equipment thereon consisting of the following, receipt of which in good condition being hereby acknowledged:

1—Service station building(s) with fixtures.
5—Coxwells without hoses, bibbs or inflators.
1—7,500 gallon underground storage tank(s).
1—5,000 gallon underground storage tank(s).
1—550 gallon underground storage tank(s).

0—.... gallon underground storage tank(s).
1—Single post hydraulic hoist.
2—Pedestal type steel cash box(s).
4—Computing service station pumps.
No. 3-12110-7-55, 3-12112-7-55, 3-12111-7-55, and 3-12116-7-55.
1—In-A-Floor safe.
2—Floodlight poles with fixtures.
1—1½ HP air compressor.
1—Steel work bench with tool panel.
1—Fire extinguisher(s).
3—Salesroom display cabinets.
8—30-gallon hiboys.
2—Triton display cart(s).
1—Service Station Management Manual.
1—Minute Man Manual.

Such real and personal property is collectively hereinafter sometimes referred to as "the service station."

2. Term: The term of this lease shall commence the 23rd day of May, 1957, and end the 22nd day of May, 1958, subject to termination by Lessee at any time on not less than thirty (30) days' written notice to Lessor. Lessor will be under no obligation to extend or renew any lease under which it may hold the service station and in the event of any termination of such lease, this lease shall terminate forthwith.

3. Rental: Lessee agrees to pay Lessor as rental for said service station at Lessor's option either (a)

a sum equivalent to Two Cents (2c) per gallon for each gallon of gasoline delivered to the service station or at Lessor's option, sold therefrom (hereinafter referred to as "gallonage rental") plus Ten Dollars ($10.00) per calendar month (hereinafter referred to as "fixed monthly rental") or (b) the sum of Two Hundred Seventy-one Dollars ($271.00) per calendar month (hereinafter referred to as "flat monthly rental"). Lessor may exercise its option to have rentals paid under either (a) or (b) above at any time and from time to time upon not less than thirty (30) days' written notice to Lessee. In the absence of such notice rentals shall be paid in accordance with (a) above.

If this lease should commence or end other than on the first or last day, respectively, of a calendar month, the fixed monthly rental or the flat monthly rental for such month shall be prorated in the same proportion that the number of days in such month for which this lease is effective bear to the full calendar month.

Lessee shall keep on said premises accurate records of all deliveries of gasoline to and from the service station which shall be available for Lessor's inspection and verification at any and all reasonable times. Upon demand, Lessee shall furnish Lessor with a signed sworn statement of the number of gallons of gasoline delivered to and from the service station during any calendar month. If and as required by Lessor, Lessee agrees to keep and

supply Lessor with a true and accurate record of the gross revenue derived from all sales of petroleum products, merchandise and services from or on the service station. Said records or statements shall be made monthly in duplicate upon forms supplied by Lessor and sworn to before a Notary Public on or before the fifth (5th) day of the following calendar month and immediately mailed to Lessor at 425 First Street, San Francisco 20, California, postage prepaid. Gallonage rental shall be paid as, when and in the manner from time to time specified by Lessor, and fixed monthly rental shall be paid on or before the twentieth (20th) day of the calendar month next succeeding that to which it applies, and the flat monthly rental shall be paid in advance on or before the first (1st) day of the calendar month to which it applies.

4. Possession: Said service station shall be used for the purpose of operating a first class motor vehicle service station and for the sale of gasoline, lubricating oil, greases, automobile tires, tubes, batteries, automotive accessories, specialties and other products customarily handled and sold in connection with the conduct of a motor vehicle service station. The service station shall not be used for any other purpose without Lessor's prior written permission, except to the extent that it is being used for other purposes on the date of this lease.

5. Hours of Operation: Lessee agrees to keep the service station open for business and properly lighted not less than 16 hours per day every day

during the months of January through December, and not less than .. hours per day during the months of .....

6. Maintenance and Repairs: Lessee will keep the service station in good condition and repair and free of weeds, debris and rubbish, and will repair or replace any damage or destruction resulting from causes within Lessee's reasonable control. In the event Lessee should fail to do so, Lessor may, at its option, clean or paint the service station or repair such damage or destruction and Lessee shall pay Lessor the cost thereof upon demand. Lessor may, at its option, repair or replace at its expense any damage or destruction resulting from causes beyond the control of Lessee. Except as hereinabove specifically provided, Lessee shall make no additions, improvements, alterations or changes in the service station or any part thereof without Lessor's prior written consent. Lessee will return the premises upon any termination of this lease in as good condition as received, except for reasonable wear and tear and damage or destruction resulting from causes beyond Lessee's reasonable control. Lessor shall have the right to inspect the premises at all reasonable times and to enter thereon for the purposes herein set forth.

Lessee will not permit or suffer any liens, attachments, judgments or encumbrances of any kind or nature to be levied or enforced against the premises or the buildings, improvements or equipment thereon or on Lessee's interest hereunder or on

Lessee's products on said premises. In the event of Lessee's failure in this regard, Lessor may pay the cost of removing any such lien, attachment, judgment or encumbrance, and Lessee will reimburse Lessor therefor upon demand.

7. Taxes and Operating Expenses: Lessee shall pay all taxes on the products, property and improvements of Lessee on the service station. Lessee will conduct its operation in strict compliance with all laws, ordinances and regulations of governmental authorities, and observe all rules of any common carrier delivering products and pay all license fees required for Lessee's operations and all occupational business, excise or other taxes levied or imposed upon Lessee's operations or upon the handling, storage, withdrawal, distribution, sale or delivery of products handled on the service station and will pay all costs of handling, storing, distributing, and selling products handled and sold by Lessee, and all water, gas, heat and electricity or other service used in Lessee's operations. Lessee shall be exclusively liable for payment of any and all premiums, contributions and taxes for Workmen's Compensation insurance, unemployment insurance, old age benefits, annuities and retirement benefits now or hereafter imposed by or pursuant to any governmental law or regulation which are measured by the wages, salaries or remuneration paid to Lessee's employees.

8. Rental Abatement: Should a substantial portion of Lessor's improvements be damaged or de-

stroyed so as to render the service station unusable for service station operations by reason of any cause beyond the control of Lessee, Lessor may terminate this lease or repair or replace such improvements and shall make such election known to Lessee within thirty (30) days after notice of such damage or destruction. Should Lessor elect to repair or replace such improvements, then the flat monthly rental shall be abated during the period of such repairs or replacement. Rental shall not be abated during any period of repairs or replacements necessitated by Lessee's negligence or by causes within Lessee's reasonable control.

9. Termination by Lessor: Lessor may at all times enter upon the service station to view and inspect the same. If Lessee fails to pay rent when due or make any reimbursements as herein provided within five (5) days after demand therefor by Lessor, Lessor may elect to terminate this lease and take possession of the service station. If Lessee should default in the performance of any of its obligations hereunder other than payment of rent and shall fail to remedy such default within fifteen (15) days after notice from Lessor, Lessor may elect to terminate this lease and take possession of the premises. Should bankruptcy or insolvency proceedings under the laws of the United States or any state be instituted by or against Lessee, or should Lessee fail to secure the release of any lien, attachment, execution or encumbrance against the service station or Lessee's interest hereunder within

five (5) days after levy thereof, or should Lessee assign this lease or any part thereof or attempt to sublet any portion of the premises, then Lessor may immediately and without prior notice terminate this lease and take possession of the service station. No such termination shall relieve Lessee of responsibility for liabilities occurring prior to termination.

10. Indemnity: Lessor shall not be responsible for any damage to property or for injury to or death of any person arising out of Lessee's operation or use of the premises and Lessee agrees to indemnify and save Lessor harmless therefrom. Lessee further agrees to carry public liability and property damage insurance in amounts and with insurance carriers satisfactory to Lessor and supply Lessor with satisfactory evidence thereof.

11. Notice: Any notices as provided herein may be given to Lessee by delivery in person or by registered mail addressed to Lessee upon or at the above-demised premises, and any notices hereunder may be given to Lessor by registered mail addressed to it at 425 First Street, San Francisco 20, California.

12. Good Faith Deposit: Lessor hereby acknowledges receipt of the sum of Fifty Dollars ($50.00), representing Good Faith Deposit, made by Lessee, and it agrees to return the amount to Lessee upon expiration or sooner termination of this lease, less any moneys due Lessor hereunder by Lessee, at such expiration or sooner termination.

13. Cancellation of Previous Agreements and Modifications: This lease cancels and supersedes any lease or other agreement of prior date between the parties hereto with reference to the possession of the demised premises and covers all the covenants, stipulations and provisions agreed upon by the parties hereto, and no employee, agent or representative of Lessor has authority to change, modify or alter the terms hereof, except by written instrument executed upon and with same authority as this lease, and neither party is nor shall be bound by any inducement, statement, representation, promise or agreement not in conformity herewith.

In Witness Whereof the parties hereto have caused this lease to be executed the day and year first hereinabove written.

UNION OIL COMPANY OF CALIFORNIA,

By /s/ W. S. CHRISTOPHER,
District Sales Manager,
Lessor.

/s/ RICHARD S. SIMPSON,
Lessee.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF J. E. CAMPBELL

State of California,
City and County of San Francisco—ss.

J. E. Campbell, being first duly sworn, deposes and says:

Continuously since June 1, 1957, I have been an employee of the Union Oil Company of California assigned as a retail representative in Fresno, California.

On April 8, 1958, I handed to Richard S. Simpson, at the Union Station located at 4010 East Ventura Avenue, Fresno, California, a document of which Exhibit A hereto is a true copy, and he signed it in my presence.

/s/ J. E. CAMPBELL.

[Endorsed]: Filed May 26, 1958.

EXHIBIT A

Union Oil Company of California
Fresno, California, March 19, 1958

Richard S. Simpson LC-4089
dba Simpson's Union Service,
4010 E. Ventura Ave., Fresno, California.

Dear Sir:

Pursuant to Section Eighth of that certain Retail Dealer Consignment Agreement between you as Consignee and the undersigned as Consignor dated April 27, 1956, whereby you were appointed our Consignee for the sale of our gasolines at your place of business at 4010 E. Ventura Ave., Fresno, California, for the term beginning the 23rd day of May, 1956, and ending the 22nd day of May, 1957, and continuing from year to year thereafter unless or until cancelled by either party at the end of the initial term or at the end of any subsequent contract year by at least 30 days' written notice to the other party to that effect, notice is hereby given that the undersigned intends to and does hereby cancel and terminate said agreement, said cancellation and termination to be and become effective at the end of the present contract year which is the 22nd day of May, 1958.

UNION OIL COMPANY OF CALIFORNIA,
By /s/ W. S. CHRISTOPHER,
Division Manager.

Dated at L-4089 Fresno, April 8, 1958.
Received April 8, 1958.

/s/ RICHARD S. SIMPSON,
Consignee.

[Title of District Court and Cause.]

AFFIDAVIT OF R. H. RATH

State of California,
City and County of San Francisco—ss.

R. H. Rath, being first duly sworn, deposes and says:

I am now and continuously since 1935 have been an employee of the Union Oil Company of California, hereinafter called "Union." My office is located at the Union Oil Center, Los Angeles, California, and I reside at 1670 Sherwood Road, San Marino, California. My title is General Sales Manager, Dealer Sales, and I am responsible for the acquisition, operation and relinquishment of all service stations or the patronage of service stations at which are sold the branded products of the Union Oil Company of California, hereinafter referred to as "Union stations."

The Union station located at 4010 East Ventura Avenue, Fresno, California, is not owned in fee by Union Oil Company of California. It is leased by Union as lessee for a term of 20 years, beginning December 1, 1955, at a monthly rental of $410.08. The fair market value of Union's interest in said service station is not less than $65,000, and the real property taxes thereon which must be paid by defendant are presently $367.00 per annum. Said rent and said taxes are payable without respect to the amount of business done at said station, and are

payable whether the station operates or does not operate.

At all times that plaintiff Richard S. Simpson was a sublessee of said service station, all gasoline delivered thereto and sold therefrom was refined in the State of California and transported to said station without ever going outside the State of California.

In the State of California there are approximately 2,000 stations selling Union's products. In addition to said stations there are about 21,000 other service stations located in California selling products supplied by Standard Oil Company of California, The Texas Company, Tidewater Oil Company, Shell Oil Company, Richfield Oil Company, General Petroleum Corporation, Wilshire Oil Company, Hancock Oil Company, Mohawk Oil Company, Douglas Oil Company and many other concerns. Of the total amount of gasoline sold through service stations in the State of California not more than 11.5% is sold from Union stations.

No lease or contract between Union and plaintiff required him to buy any products of the Union Oil Company of California or not to handle or sell products made by anyone else.

The success of Union's gasoline business depends in large part on the service station dealers handling its products, and upon their ability to build good will for the Union Oil Company and its products. A Union dealer who tells motorists that a Division

Manager of the Union Oil Company acts in bad taste and with bad judgment, and is playing a dirty, rotten trick, without valid cause, and is not "Christian and American," does the Union Oil Company incalculable harm.

Plaintiff has made these representations to several hundreds of motorists, by writing letters to them, and by composing and delivering to them a form letter for them to send to Mr. Reese H. Taylor, Chairman of the Board of Directors of defendant. Attached hereto and marked Exhibit A is a true copy of a letter written by plaintiff and sent to several hundred motorists. Attached hereto and marked Exhibit B is a true copy of a letter composed by plaintiff and delivered to several hundred motorists with the letters of which Exhibit A is a true copy. Approximately 230 letters on the form of Exhibit B have been received by Union and are in my possession.

/s/ R. H. RATH.

Subscribed and sworn to before me this 26th day of May, 1958.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires October 14, 1958.

EXHIBIT A

To My Customers

Time will not permit my writing a separate letter to each of you as I would like to do. Most of you I know very well, and I feel you know me very well.

I am writing this letter to ask your assistance. Mr. W. S. Christopher, the local manager for Union Oil Company, has informed me that he will not renew my lease at the Union Oil Station I operate on the corner of 10th & Ventura in Fresno. He gives no reason in his notice.

I believe this to be a dirty, rotten trick without valid cause. It is against everything I was brought up to believe right, Christian and American. I intend to do everything in my power to have Mr. Christopher's action changed and with your help I believe this can be done. I do not think Mr. Christopher's action is indicative of the policy of the Union Oil Co.

I have made every effort to run my business in an efficient, honest, businesslike manner and have worked every day for nearly two years with only 14 days off to keep my head above water, waiting for the day that Ventura Avenue construction would be finished and I could make a decent living without working seven days a week and up to 16 hours a day.

If you would like to help me, to get a new lease, here is what you can do: Write a letter to Mr. Reese Taylor, Chairman of the Board of Union Oil Company, and tell him if you like the manner in which I operate my service station.

If you are too busy to write a personal letter, then use the form letter enclosed. If you are a stockholder of Union Oil stocks, or a credit card holder, so state in your letter or as a P.S. on the bottom of the form letter. Your Name and Address Is Important.

Sincerely,

/s/ DICK SIMPSON,
Your Union Dealer.

Enclosure.

EXHIBIT B

Mr. Reese H. Taylor,
Chairman of the Board of Directors,
Union Oil Center,
461 So. Boylston Street,
Los Angeles 17, California.

Dear Mr. Taylor:

I am a customer of Richard Simpson, Union Oil dealer at the corner of 10th & Ventura, Fresno, California, Station No. L-4089.

I have been informed that Mr. W. S. Christopher, your local manager, has refused Mr. Simpson a new

lease. I am shocked at this action. From my observation, Mr. Simpson has always operated his service station in an honest, businesslike manner that has brought credit to the Union Oil Company. For the past year he has operated under extremely difficult circumstances due to the construction work on Ventura Street in front of his place of business.

Now that the end of the construction work is in sight, your local manager is refusing to renew his lease.

I consider this action very wrong and against my conception of fairness, Christianity, Americanism, and even good business. I consider Mr. Christopher's action in extremely bad taste and judgment, and request an immediate renewal of Dick Simpson's lease.

Very truly yours,

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiff operates a Union Oil Service Station in Fresno. For the past two years he has been a lessee of defendant, who has refused to extend plaintiff's lease. By its terms, it expired on May 23, 1958. Two days before plaintiff's term had run, he obtained an order to show cause and a temporary restraining order against defendant in order to pre-

serve the status quo until the Court should have an opportunity of hearing plaintiff's alleged grievance in connection with a violation of the antitrust laws. Plaintiff relied upon 15 U.S.C.A. 26 as the basis for seeking injunctive relief.

The substance of plaintiff's complaint is that defendant, acting under a consignment agreement for the disposition of gasoline products, has sought to fix retail prices. When plaintiff, in order to meet competition, refused to comply with defendant's price schedule, he was informed that he would not have his lease renewed. In order to protect his interest in the leased premises and to obtain an extension of the lease, plaintiff has initiated the present action.

Defendant contends that as of this time there is no contract outstanding. Since the lease expired by its own terms on May 23rd, the Court will not compel defendant to grant an extension. United States v. Klearflax Linen, 63 F. S. 32, 42; United States v. Bausch & Lomb, 321 U. S. 707. This Court has previously ruled, in Meyberg Co. v. Eureka Williams Corporation, 215 F. 2d 100, that it will not compel the making of a new lease. See also, Hudson Sales Corp. v. Waldrip, 211 F. 2d 268.

There is no longer a status quo to preserve, plaintiff's lease having expired (Hershel California Fruit v. Hunt Foods, 111 F. S. 732; Ball v. Paramount Pictures, 57 F. S. 505, 507). Furthermore, since plaintiff's contract relationship has terminated, he has no standing to enforce the antitrust laws on be-

half of those who may be aggrieved because of alleged price fixing contracts (Zenith Radio vs. R. C. A., 106 F. S. 561, 576; United States v. Borden Co., 347 U. S. 514, 518; cf. Klors, Inc., v. Broadway Hale Stores, Inc., CC. (9th) #15380, 1958 Trade Cases par. 69,007, decided Mar. 28, 1958).

If plaintiff has a cause of action for defendant's alleged breach of a contractual relationship, he is not without remedy, which is adequate to compensate him (Cappeta v. Atlantic Refining Co., 74 F. 2d 53).

Accordingly, It Is Ordered that plaintiff's motion for a preliminary injunction be, and the same hereby is, Denied, and the temporary restraining order be, and the same hereby is, Terminated.

Dated: June 3, 1958.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 3, 1958.

[Title of District Court and Cause.]

ORDER AND STIPULATION

Defendant Union Oil Company of California having duly moved to dismiss the complaint on file herein for failure to state a claim upon which relief may be granted, and for summary judgment, and plaintiff Richard S. Simpson having duly moved for leave to file an amended complaint;

It Is Hereby Ordered that:

1. Defendant's said motion to dismiss shall be, and it is hereby, granted, with leave to plaintiff to amend his complaint;

2. Defendant's said motion for summary judgment shall go off calendar;

3. Plaintiff's said motion for leave to file an amended complaint shall be, and it is hereby, granted without prejudice to the rights of defendant to make such motions respecting and directed to said amended complaint as it may be advised.

Dated: June 30, 1958.

/s/ GEORGE B. HARRIS,
United States District Judge.

Stipulation

It Is Hereby Stipulated by and between the parties hereto that the foregoing order may be made.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant, Union Oil Company of California.

[Endorsed]: Filed July 1, 1958.

[Title of District Court and Cause.]

AMENDED COMPLAINT
(Jury Demanded)

The above-named plaintiff complains of the above-named defendant for an for cause of action alleges:

I.
Parties

1. Plaintiff has been the lessee and operator of a Union Oil Company service station located at 4010 E. Ventura Avenue, Fresno, California. He has been the lessee at said station for two years last past.

2. Defendant, Union Oil Company of California (hereafter referred to as Union Oil Company), is a corporation organized and existing under the laws of the State of California. It has an office and a place of business located at 425 First Street, San Francisco, California.

II.
Jurisdiction and Venue

3. The complaint is filed and these proceedings are instituted against the above-named defendant under Sections 15 and 26 of Title 15 U.S.C.A., being a part of the Act of Congress of July 2, 1890, c. 649, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies, commonly known as the

Sherman and Clayton Act." Said Act, 15 U.S.C. 26 gives this Court jurisdiction to grant injunctive relief against threatened loss or damage by violation of the antitrust laws.

III.

Interstate Trade and Commerce

4. Defendant Union Oil Company is a vast corporation, doing business in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, Nevada and in the Territories of Alaska and Hawaii. It has assets in excess of three hundred million dollars. It drills, produces and imports vast quantities of crude oil; said drilling, production and importing taking place in trade and commerce between the several states and in foreign commerce.

5. Defendant Union Oil Company operates oil and petroleum pipelines in the States of California and Montana and Washington. Said defendant owns or operates or leases ships designed to transport its crude oil and products along the seacoast of the west coast and in foreign commerce.

6. Defendant Union Oil Company operates refineries in the States of California and Montana which refine oil into gasoline and other petroleum products. Defendant Union Oil Company operates at least four refineries in the United States; one at Wilmington, California; one at Cut Bank, Montana; one at Seattle, Washington, and one at Oleum, California.

7. Defendant Union Oil Company is a wholesale distributor of petroleum products. It owns or operates approximately 502 bulk plant stations located throughout the eight western states above named. A substantial amount of sales are made by Union Oil Company out of said bulk plants to wholesalers, retailers and to its own retail outlets; said customers being located in the eight western states, above.

8. Defendant Union Oil Company owns, operates or leases a vast number of gasoline transports in the eight western states, above, which pick up petroleum products at transport terminals and deliver the petroleum products of Union Oil Company to large storage retail outlets.

9. In addition to the aforesaid activities of defendant Union Oil Company in the production, refining and delivery of oil and petroleum products, said defendant is also a large retailer of petroleum products in the eight western states. It has directly owned approximately 52 retail stations in the eight western states.

10. Defendant Union Oil Company has obtained and exercises effective control over the operations of approximately 4,733 service stations in the eight western states, which sell millions of dollars of gasoline and oil products to consumers. These retail outlets have been operated by independent businessmen. Defendant Union Oil Company acquires possessory interests in service station sites in the eight

western states and engages in the business of leasing such sites to others. Most of these service station sites are leased or subleased by Union Oil Company to independent operators. All of these operators have entered into supply contracts with the said defendant. By means of various provisions in these leases, subleases, and supply contracts, and by means of a system of policing which subjects the business operations of these independent service station operators to minute inspection and surveillance, the said defendant completely dominates and controls the manner in which these independent businessmen operate their retail outlets. The defendant Union Oil Company requires the independent operators who sell its refined petroleum products to purchase their requirements exclusively from said defendant; and not to handle or sell the petroleum products of others. Defendant Union Oil Company controls the price at which these independent operators resell gasoline and other petroleum products. Defendant Union Oil Company directly controls millions of dollars of petroleum sales in the eight western states.

11. The practices hereinafter alleged as in violation of the antitrust laws directly affect said retail activities in the eight western states.

12. As of 1957 the total volume of business of Union Oil Company was $436,731,000.00 and it marketed 60,404,000 barrels of petroleum products which were in or affected interstate and foreign trade and commerce.

IV.

Offenses Charged

13. Beginning on or about May, 1955, and continuing thereafter up to and including the date of the filing of this Complaint, the defendant Union Oil Company has and now is engaged in the effectuating of contracts which restrain unreasonably, and pursuant to said contracts has in fact unreasonably restrained interstate trade and commerce, and has attempted to and intended to monopolize the sale of gasoline in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act. Defendant threatens to continue and will continue the violation of said sections unless the relief hereinafter prayed for in this Complaint is granted.

14. The aforesaid contracts attempt to monopolize and the actual monopolization has resulted and does result from entering into agreements with thousands of otherwise independent service station lessees which allows the defendant direct control over retail prices charged to the public for gasoline.

15. Prior to May, 1955, the defendant Union Oil Company did not attempt to directly fix the prices of refined gasoline by its lessees by means of an express written document. Said retail price fixing was done indirectly by employees or agents of said defendant who constantly watched the pricing policies of thousands of independent lessees or sublessees of said defendant and who carried out a pro-

gram of having said independent businessmen abide by the prices fixed by the Union Oil Company.

16. Starting on or about May, 1955, the defendant Union Oil Company created a contract known as the "Retail Dealer Consignment Agreement." Said agreement is attached hereto and incorporated herein as Exhibit "A." This contract was forced by said defendant on independent service station lessees who otherwise are responsible to themselves for the operation of said service stations. Said agreement directly fixes the retail prices that these thousands of otherwise independent service station operators can charge on the resale of gasoline at the prices set by the Union Oil Company. Existing independent lessees were forced to sign said consignment agreements on fear of losing their leases, and new independent lessees were unable to obtain leases from defendant Union Oil Company without submitting to signing the new "Retail Dealer Consignment Agreement."

17. The aforesaid contracts attempt to monopolize and the actual monopolization of the retailing of gasoline has also consisted and does consist in the defendant's attempting to and actually controlling the retailing of gasoline and oil products produced and distributed by it. Defendant has and does place otherwise independent lessees of its property under its control and domination so that said independent businessmen have no freedom in selecting and selling petroleum products. By such domination, the said defendant controls virtually all of the

profits to be made in the retailing of gasoline and oil products at the expense of said independent lessees.

18. a. Defendant Union Oil Company at all times herein has required independent lessees of service stations to accept leases of only a one year duration, and will not renew leases for additional periods unless the lessee has fully complied with the requirements and conditions established by Union. Said defendant requires that independent lessees purchase all their gasoline from defendant Union and sign and subscribe to the consignment prices established by it, as aforesaid.

b. Defendant Union enforces its conditions and requirements on said independent lessees by hiring employees whose task it is to police the activities of the independent lessees of Union to make certain that said lessees are following the policies set by Union. On reports of improper conduct by said employees Union will refuse to renew leases to errant lessees.

c. Defendant Union does not allow its lessees to select their successors should they desire to sell their property interests and prevents said independent lessees from obtaining any compensation for "good will" said lessees have developed while they have operated the service stations or the fair market value of their business.

d. Defendant Union directly controls the ability of independent lessees to operate profitably by freely

selling its gasoline to companies who operate large "off brand" service stations. These companies, as is known to defendant Union, sell Union gasoline at retail prices well below the prices established by Union in its consignment contracts. By such practice the defendant is able to control the number of outlets selling gasoline at less than established consignment prices, and is able to dump large amounts of gasoline at a few selected locations rather than reducing the price of gasoline to all retailers.

V.

Effect of Violations

The aforesaid contract and plans of the defendant had and has the following effects on interstate trade and commerce:

a. They prevent the putative independent service station operators from establishing their own retail gasoline prices in the eight western states.

b. They prevent the consuming public from obtaining the benefits of price competition among putative competitive independent retail operators who sell the defendant's gasoline for resale.

c. They prevent price competition between putative independent retailers of gasoline in competition with the competitors of Union Oil Company.

d. They replace the independence of approximately four thousand petroleum retailers by the

forced acceptance of a "consignee" relationship as to gasoline alone.

e. The consignment contract is enforced by scare tactics and coercive devices which seriously interfere with the happiness and liberty of otherwise independent businessmen.

f. They prevent independent lessees from possessing any ability to demand and receive lower wholesale gasoline prices.

g. They prevent independent lessees from selecting their successors and from obtaining compensation for "good will" or to sell their interests with regard to the profits they have created in their business.

VI.

Injury to Plaintiff

19. Plaintiff has been connected with the wholesaling and retailing of gasoline since 1948. As of May 23, 1955, he entered into a lease with Union Oil Company for the right to operate property held in fee by Union Oil Company at 4010 E. Ventura Avenue, Fresno, California. At the time of the entry into said lease said service station had free and open access to the public. Approximately a year ago said service station was on the frontage of a highway under heavy construction. Said lease of May 23, 1955, continued for one year until May 22, 1956.

20. At the time of the expiration of said lease, it was known that the plaintiff would be expected

to operate his station under serious and adverse conditions under which the station was difficult of access by the consuming public. Said plaintiff, however, realizing the difficulties of said operation, but in the expectation that his efforts and labors under such adverse circumstances would be appreciated and rewarded by said defendant, entered into a lease on April 9, 1957, effective May 23, 1957, for an additional year, terminating on the 22nd day of May, 1958.

21. As a condition to the above leases defendant Union Oil Company required that plaintiff sign the said Retail Dealer Consignment Agreement, attached hereto as Exhibit "A." Plaintiff protested the signing of said agreement, but was informed, in effect, that he could not obtain a lease without signing said consignment agreement.

VII.

Termination of Lease

22. There are directly competitive to the service station leased by plaintiff, three service stations which sell the product of Standard Oil Company, Tidewater-Associated Oil Company, and Richfield Oil Corporation.

23. On or about March, 1958, these competitive service stations lowered the price of their regular gasoline to 27.9¢ from 34.9¢. In order to meet this competition, plaintiff, after requesting authorization from defendant which was refused, lowered his price

to 27.9¢. The stipulated consignment price, however, had been set at 29.9¢ by defendant.

24. Approximately a week later, Mr. W. S. Christopher, Division Sales Manager, Fresno Area, called on plaintiff and told him that he was breaking the consignment agreement and ordered his prices up to the authorized consignment price of 29.9¢, and informed plaintiff that he would do everything in his power to cause plaintiff to conform to said prices. He implied by words and action that plaintiff's lease would not be renewed unless he raised his prices to 29.9¢.

25. Following said conversation, plaintiff refused to abide by the commands of said Christopher, and persisted in setting his own retail prices.

On or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant Union Oil Company.

26. Plaintiff requested that he be allowed to continue to lease said property at 4010 E. Ventura Avenue, as is customary and usual with the defendant Union Oil Company with lessees who have been in possession of a lease for a prior period and have successfully leased the station.

27. Plaintiff has successfully operated said service station, but his lease has not been renewed. The only reason known to plaintiff for the refusal of said defendant to renew his lease is that he refused to allow defendant to fix his retail prices as set by

defendant under its Retail Dealer's Consignment Agreement, Exhibit "A" hereto.

28. As a direct result of the illegal contracts and plan to monopolize the retailing of gasoline and oil products manufactured and distributed by Union, the plaintiff was compelled to accept a one year lease from the defendant Union, compelled to accept a consignment agreement directly fixing the prices of his gasoline, and compelled to remove himself from the premises at 4010 E. Ventura Avenue, Fresno, California, as of June 5, 1958. That had the plaintiff not been an errant lessee as aforesaid he would have obtained and continued to have obtained successive leases for said property from the defendant.

29. By reason of the aforesaid violations of the antitrust laws plaintiff was unable to fix the prices of his gasoline during the period May, 1955, to March, 1958, to his injury and damage in the amount of $1,000.00.

30. By reason of the aforesaid violations of the antitrust laws plaintiff was unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interests as a lessee to a successor of his own choosing, was prevented from selling his "good will" and was prevented from obtaining the fair market value of his business all to his injury and damage in the amount of $150,000.00.

Wherefore, plaintiff prays as follows:

1. That summons issue to the defendant commanding it to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the aforesaid Retail Dealer Consignment Agreement, Exhibit "A," hereto, be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

3. That the Court enjoin the defendant from the further effectuation of said agreements on independent service station operators.

4. That the Court enjoin the defendant from leasing service stations except for a period of three years with an option for two additional years.

5. That the Court enjoin the defendants from requiring independent lessees to obtain their petroleum products from it.

6. That the Court enjoin the defendant from preventing independent lessees from choosing their successors and from selling their "good will" and business values to others.

7. That the plaintiff receive with interest as damages to his business the sum of $151,000.00, or such other sums as the further proceedings in this case may disclose as his damages, and that said sum be trebled, in accordance with Section 4 of the Clayton Act.

8. That the plaintiff recover his costs and that reasonable attorney fees be awarded by the Court.

9. For such other and further relief as the Court may deem proper.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

MOTIONS TO DISMISS THE AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT

Defendant Union Oil Company of California hereby moves, pursuant to R.C.P. 12(b)(6) and 56, to dismiss the amended complaint for failure to state a claim upon which relief may be granted, and for a summary judgment that plaintiff take nothing.

These motions are based on the pleadings, papers and affidavits already on file herein, on a certified copy of a judgment of the Superior Court of the State of California, in and for the County of Fresno, in an action the short title of which is Union Oil Company of California, Plaintiff, vs. Richard S. Simpson, Defendant, No. 102048, served and filed herewith, and on the Affidavit of R. H.

Rath in Support of Motion for Summary Judgment, served and filed herewith, and are made on the grounds that the complaint fails to state a claim for relief; that there is no genuine issue as to any material fact; and that defendant is entitled to judgment as a matter of law.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

Notice of Motions

To: Plaintiff above named, and to his attorney, Maxwell Keith, Esq.:

Please Take Notice that on Monday, July 28, 1958, at 9:30 a.m., or as soon thereafter as counsel may be heard, defendant will bring on the foregoing motions for hearing before the Honorable George B. Harris, Master Calendar Judge of the above-entitled Court, Seventh and Mission Streets, San Francisco, California.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

[The certified copy of the Judgment of the Superior Court of the State of California, in and for the County of Fresno, attached to the foregoing is identical to Exhibit B attached to the Answer of Defendant to the Amended Complaint.]

Certificate of service attached.

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

STIPULATION

In order that defendant Union Oil Company of California need not at this time compile statistics which may prove to be unnecessary to the disposition of this cause, and without stipulating to the relevance of any matter herein set out,

It Is Hereby Stipulated by and between the parties hereto that, for the purpose of ruling on defendant's pending Motions to Dismiss the Complaint and for Summary Judgment, the following may be taken to be true:

In each of the States of Montana, Arizona, Nevada, Oregon, Washington, California, Utah and Idaho, there were, during the years 1956 and 1957, service station operators who dispensed defendant's gasolines and who were parties to consignment agreements of the type attached to plaintiff's com-

plaint as Exhibit A and that in each of said states the volume of said gasolines so dispensed was not less than 250,000 gallons annually;

It Is Hereby Further Stipulated that, in the event that defendant's said pending motions are denied, defendant shall have to and including thirty days after the entry of said order in which to answer or object to Plaintiff's First Interrogatories.

Dated: September 10, 1958.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant.

It Is So Ordered.

/s/ ALBERT C. WALLENBERG,
United States District Judge.

60 days time heretofore obtained.

[Endorsed]: Filed September 11, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD S. SIMPSON

State of California,
City and County of Fresno—ss.

Richard S. Simpson, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action and makes this affidavit in opposition to the defendant's motion for summary judgment.

That at all times from the period May, 1956, to May, 1958, the defendant in the above-entitled action placed me under a consignment method of selling gasoline under which it directly controlled the price of the gasoline I sold to the public.

That during the period February, 1948, to May, 1956, I was employed by the defendant Union Oil Company. During the period May, 1955, to May, 1956, I was a retail representative of the defendant Union Oil Company. In this position, I was in Santa Maria, California, and was employed to supervise Service Stations which sold Union Oil Company petroleum products.

Based on my experiences while working for Union Oil Company, a lease would not be given to a dealer unless he signed the consignment agreement.

During the period May, 1956, to May, 1958, I desired to set my own retail price for the sale of Union Oil Company petroleum products. For the period May, 1956, to at least March, 1957, I did in fact sell gasoline at the exact prices established by the Union Oil Company. In being unable to set my own prices, I estimate my losses to be at least $1,000.00. For the period March, 1957, to March, 1958, I did in fact sell gasoline at the general level of prices established by the Union Oil Company. The business practices of Union Oil Company forced me to do this as Union Oil Company paid me on a consignment commission basis which in turn based my commission from the retail price. These retail prices, as do the consignment prices, fluctuate constantly, and at times from day to day.

As an example, the affidavit of R. H. Rath says that the authorized consignment price of "7600" was 32.1c as of January 8, 12, 13, 15 and 19, 1957, but the Consigned Gasoline Delivery Ticket dated January 16, 1957, states that the authorized retail price for "7600" was 32.9c, the price that I am quoted as charging. The same is true as to the Consigned Gasoline Delivery Tickets dated January 31, 1957.

As further example, the affidavit of R. H. Rath says that the authorized consignment price of "7600" was 32.1c as of December 19, 26 and 31, 1956; yet my Consigned Gasoline Delivery Ticket dated December 12, 1956, states that the authorized retail price was 33.5c, the price I am quoted as charging.

Thus I was forced to follow closely the general level of consignment prices authorized by Union Oil Company.

On or about May, 1957, I protested the signing of a consignment agreement and was told my lease would not be renewed unless I set the price authorized by Union Oil Company.

On or about April, 1957, the service station involved herein was under a serious business handicap as the highway allowing access to it became under heavy construction. On or about November, 1957, construction underway started on my side of the highway and at times, because of weather conditions the construction almost prevented access to the service station. This situation lasted from November, 1957, to approximately June, 1958. I would not have weathered this difficult business condition if I did not feel that my lease would have been renewed.

I claim that the only reason that my lease was not renewed after May 22, 1958, was because of my attempt to set my own retail prices for Union Oil Company petroleum products as set forth in the complaint.

It is my experience based on my knowledge and experience in the retailing of gasoline that a one-year lease is an unreasonably short period of time to lease a service station consistent with the ability of the lessee to determine his own business policies. I would further have desired at all times herein to

have signed a lease for the service station involved for a period much longer than said period.

It is my further experience that said one-year provision allowed Union Oil Company to directly control and dictate the business policies of the independent service station lessee of Union Oil Company, however opposed said independent lessees may be to said policies.

/s/ RICHARD S. SIMPSON.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ SETSU HIRAOKA,
Notary Public.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD S. SIMPSON

State of California,
City and County of Fresno—ss.

Richard S. Simpson, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action and makes this affidavit in opposition to the defendant's motion for summary judgment.

That in order to lease the service station I was required to expend the amount of $3,359.21 for equipment and supplies. That I further expended the sum of $396.89 for equipment and necessaries

needed in my business as an operator of a Union Oil Company service station during the two-year period.

That during the period May, 1956, to May, 1958, I worked over twelve hours a day seven days a week in order to earn sufficient sums to support my family, with only fourteen days off for rest. That said large efforts were made in the contemplation that by the time the highway which gave access to my service station was finished I would be able to average approximately ten thousand dollars a year as net income. Such a yearly income would be the result of my special attention and services which created customer satisfaction and so created a large established clientele. Thus, in the two years at the service station involved I did in fact establish a large following which would have secured me success in the future. As example, the affidavit of R. H. Rath, General Sales Manager, Dealer Sales for the defendant, filed in connection with defendant's Opposition for Preliminary Injunction, shows that approximately two hundred and thirty customers supported my desire to obtain a lease renewal from the defendant by writing letters to the defendant requesting that I continue in possession of the leasehold. This is a very large number of customers to support such a position.

Based on my experience as a retail representative for the defendant and as a lessee of their service station, I can state that it is customary for Union Oil Company, in the ordinary course of business,

to continually renew service station leases for many, many years. It was my desire to have a permanent location with the defendant since, by reason of the service station business, continual occupancy of a given site allows the lessee the opportunity to develop his clientele. Consequently, the refusal of the defendant to renew my lease caused me great and irreparable damage.

It has been impossible for me to retain all my customers developed while at the service station involved herein, and I have been forced to virtually start all over again in the service station business. I had reached the position, by reason of my long hours and special efforts expended at the service station involved herein, where I could hire employees and would have been able to operate the station at a substantial margin of profit. But I have now lost this opportunity and I am in the position of having to develop another service station site.

Thus, once again, I am in the position of having to work over twelve hours a day, seven days a week. I would not be in this position today had I retained occupancy of the service station involved herein.

/s/ RICHARD S. SIMPSON.

Subscribed and sworn to before me this 3rd day of October, 1958.

[Seal] /s/ SETSU HIRAOKA,
Notary Public.

[Title of District Court and Cause.]

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

To the defendant Union Oil Company and its attorneys, Brobeck, Phleger and Harrison, Moses Lasky, and Richard Haas:

Plaintiff requests defendant within ten days after the service of this request to admit for the purposes of this action only the truth of the following facts and the genuineness of the following documents:

1. That R. H. Rath is now and was acting at all times pertinent to this action as General Sales Manager, Dealer Sales of the defendant, and as managing agent or officer of the defendant.

2. That R. H. Rath was acting within the scope of his authority in writing the letters referred to in Request No. 3.

3. That the documents attached hereto as Exhibits 1 and 2 are true and correct copies of letters sent by R. H. Rath to Division Managers, Dealer Sales, of your company.

Dated: October 16, 1958.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

EXHIBIT No. 1

Union Oil Company of California
Los Angeles, California, May 16, 1958

EAM-419.

Division Managers—Dealer Sales.

Retail Pricing Policy and Retail Dealer Consignment Policy

Further to our letter, EAM-325, dated April 15, 1958, regarding the above policies and particularly to Exhibit "D" attached thereto, we wish to clarify the instructions set forth in said Exhibit "D" as follows:

1. When a dealer, who has signed the new consignment agreement, is taking an unauthorized add-on the entire add-on is to be accounted for by the dealer to the company. The Consigned Gasoline Delivery Ticket, Form 387, will be extended at the price shown on the dealer's pump, but the dealer's commission will be that as authorized by the Form 795R-PN2 in effect at the time of the replacement delivery.

2. The accounting for all unauthorized add-ons by the dealer to the company shall be effective, as to each individual dealer, immediately upon his signing a new consignment agreement regardless of whether he is in an area that has been converted to the new Dealer Sales Pricing Policy or he is in an area that is still on the old pricing policy.

3. Your Division office or your Retail Represent-

atives will prepare a list of all dealers, in the Division or in the Retail Representatives' respective fields, that have signed the new consignment agreement and forward the list to the marketing station or terminal that is charged with the making of replacement deliveries to the stations shown on such list. A copy of the list should be forwarded to the responsible accounting office. Each time a dealer signs the new consignment agreement, the marketing station or terminal and accounting office should be advised immediately.

4. When all the dealers in a geographical area, as defined previously, have signed the new consignment agreement and the area is converted to the new Dealer Sales Pricing Policy, a list of the individual stations in such area shall be furnished the marketing station and/or terminal and accounting office involved.

/s/ R. H. RATH,
General Sales Manager,
Dealer Sales.

EAM:tas.

cc: W. L. Spencer,
Division Managers, Direct Sales,
H. M. Schafer,
D. A. Reed,
Distribution Managers,
Terminal Superintendents,
Distribution Supervisors,
Regional Accountants,
Chief Marketing Auditor,
Wholesale Consignees—for information only.

EXHIBIT No. 2

Union Oil Company of California
Los Angeles, California, April 15, 1958

EAM-325.

To: Division Managers, Dealer Sales.

Retail Pricing Policy and Retail Dealer Consignment Policy

During previous discussions, we have outlined to you that in order to become completely competitive with the other major retail petroleum marketers in our domestic marketing area as to normal retail prices, amount of dealer margins and amount of dealer participation in any reductions in prices below normal retail, Management has revised the retail pricing policy and the retail consignment commission policy.

In order that each of you will be conversant with these new policies, we attach the following exhibits which explain said policies and outline the method to be employed in changing to such policies:

1. Exhibit "A" outlining the new retail pricing policy.

2. Exhibit "B" outlining the new retail consignment commission policy.

3. Exhibit "C," form of special letter to be given to the retail consignee as explained in Exhibit "B."

4. Exhibit "D," instructions covering pricing of replacement deliveries of gasoline when a dealer, signed to the new consignment agreement, takes an unauthorized add-on.

5. Exhibit "E," instructions covering the procedure to be used in preparing your posted price schedules when areas within a marketing station area are changed to the new pricing policy.

In addition to the above-enumerated exhibits we also attach a copy of the new Form 795R, Retail Dealer Consignment Agreement, and copies of commission schedules showing the commissions payable when a dealer has been converted to the new pricing and commission policy. One schedule is for a delivery differential of 1c and one is for a delivery differential of 1½c and the commissions include a dealer absorption of 20% of any price below normal retail and dealer retention of 80% of any authorized add-on price above normal retail.

It is Management's desire that these policies be instituted as quickly as possible and to accomplish this it is vital that we have the full co-operation of all concerned.

/s/ R. H. RATH,
General Sales Manager,
Dealer Sales.

EAM:em.
Attachments.
cc: W. L. Spencer,
Division Managers, Direct Sales,
Wholesale Consignees, for information only.

Exhibit "A"

Retail Pricing Policy

As soon as practicable the following Retail Pricing Policy will be placed in effect in all areas except Alaska, Hawaii, Montana, Wyoming and North Dakota in which areas no change will be made:

1. Dealer Sales posted tank wagon prices are established for Royal 76 Gasoline and 7600 Gasoline uniformly at $.005 per gallon over the customary Direct Sales posted tank wagon prices.

2. Normal Retail prices will be $.045 per gallon over Union's Dealer Sales posted tank wagon price for both Royal 76 Gasoline and 7600 Gasoline.

3. Retail Dealer Consignee commissions will be the difference between the normal retail price and the 400 gallon Dealer Sales posted tank wagon price plus method of delivery differential applicable, provided:

A. In the event the authorized retail price is above the normal retail price, the consignee's commission shall be increased by an amount equal to 80% of such difference between authorized retail and normal retail, and

B. In the event the authorized retail price is below the normal retail price, the consignee's commission shall be reduced by an amount equal to 20% of the difference between normal retail and authorized retail.

4. Dealer retail prices authorized for consignee dealers and recommended for non-consignee dealers will be established as follows:

A. Normal or above normal markets, all areas: Prices on both Royal 76 and 7600 Gasoline shall equal predominant competitive major gasoline prices.

B. Depressed markets: Subject to general provision C.

(1) In all areas excluding Montana, Wyoming, North Dakota and those portions of Rocky Mountain Division, Dealer Sales within the States of Nevada, Oregon, Idaho and Utah:

(a) 7600 Gasoline will be equal to predominant competitive major prices or Standard Stations, Inc., prices if latter are lower.

(b) Royal 76 Gasoline will be $.05 per gallon over the authorized 7600 Gasoline price, but not more than $.01 over predominant competitive major prices.

(2) In that portion of Rocky Mountain Division Dealer Sales within the States of Nevada, Oregon, Idaho and Utah:

(a) 7600 Gasoline price will be equal to the predominant competitive major gasoline price.

(b) Royal 76 Gasoline will be $.005 per gallon above the predominant major competitive premium price, provided that the differential between 7600

Gasoline and Royal 76 Gasoline shall not be less than normal.

C. General Provisions:

(1) Any reduction in prices below normal retail prices or any further changes in price that are at any time below normal retail are to receive prior approval of the General Sales Manager, Dealer Sales.

Exhibit "B"

Retail Dealer Consignment Agreement Commission Policy

In conjunction with the new Retail Pricing Policy outlined in Exhibit "A," our commission policy as to retail consignment will be as follows:

1. When our authorized retail price is more than the normal retail price, the consignee's commission will be increased by an amount equivalent to eighty per cent (80%) of any such increase of the authorized retail price over the normal retail price.

2. When our authorized retail price is less than the normal retail price, the consignee will absorb twenty per cent (20%) of any such reduction of the authorized retail price under the normal retail price.

3. There will no longer be minimum commissions shown in the Consignment Agreement.

Form 795-R, Retail Dealer Consignment Agreement (copy attached) has been revised to incorporate a new commission payment section covering the above-mentioned policy.

Paragraph 8 of Section Second of said agreement has been revised to require the consignee to account to us for all monies derived from the sale of gasoline but in no event less than our authorized retail price. (See Exhibit "D" for pricing instructions covering those dealers who take unauthorized add-ons.)

All dealers will be signed to the new Consignment Agreement as soon as practicable; however, the minimum commissions will remain as at present for an indeterminate period of time and this will be handled by the use of a special letter (Exhibit "C").

The change to the new Consignment Agreement will be handled as follows:

1. New dealers will be signed to the new agreement and concurrently therewith they will be given the special letter which will be effective until all retail consignees in a specified geographical area are signed to the new Consignment Agreement.

2. Our present dealers will be urged to sign the new Consignment Agreement immediately and concurrently therewith we will give them the special letter which will be effective as set forth for new dealers.

3. A thirty-day notice of cancellation will be served on all our present consignee dealers who re-

fuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give him the special letter which will be effective as previously set forth herein.

It is hoped that this new program will be completely effective before April 30, 1959.

This policy will be made effective by specified geographical areas. The policy will not be put into effect in any area until approval so to do is obtained from General Sales Manager, Dealer Sales, Home Office.

A specified geographical area is an area that does not conflict competitively with another area. It may be a separate area within a marketing station area.

Exhibit "C"

Consignee,
(Address),
(City and State).

Dear Sir:

Referring to that certain Retail Dealer Consignment Agreement between you and us of even date herewith, it is agreed, until this letter is terminated by us, that:

(a) Reference to "Consignor's posted Dealer Sales tank wagon ex-tax price" shall be deemed to be Consignor's posted tank wagon ex-tax price:

(b) Your commissions under paragraph 2 of Section Third will in no event be less than .... cents for each gallon of 7600 Gasoline and .... cents for each gallon of Royal 76 Gasoline; and

(c) When our authorized retail tax-included price exceeds our posted normal retail tax-included price, your commission will include the full amount of such excess.

We reserve the right to terminate this letter agreement in whole or in part at any time by written notice to you.

Please signify your agreement to the foregoing by signing the duplicate hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Agreed to:

.....,

Consignee.

Exhibit "D"

Paragraph 8 of Section Second of the new Consignment Agreement requires the retail consignee to account to us for all monies derived from the sale of our gasolines, but in no event at less than our authorized price.

It will be the duty of all employees and wholesale consignees to notice the price at which dealers are selling consigned gasoline and if they encounter any dealers taking unauthorized add-ons, this is to be reported to the marketing station or terminal from which replacement deliveries are made to any such station and the tank truck salesman or transport driver will bill the replaced gasoline at a price that includes the unauthorized add-on. When a driver arrives at a station to make a replacement delivery, he will first check the pump to ascertain the price being charged by the dealer. If such price includes an unauthorized add-on, then he shall bill the replaced gasoline at such price.

Exhibit "E"

Posted Prices

Price Book Page Tempo-1, 3/1/58.

This temporary Price Book Page is to be retained in all Marketing Station areas until the effective date of Dealer Sales, Tank Wagon Prices, has been established for all points within each individual Marketing Station area and will then be destroyed.

Form 901 and Form 901-B.

Form 901 will be posted at all Marketing Stations until the effective date of Dealer Sales, Tank

Wagon Prices, are established for the Marketing Station area.

Form 901-B (a new form) will supersede Form 901 when and as Dealer Sales, Tank Wagon Prices, become effective in part or all of a Marketing Station area. Handling to be as follows:

A. When the new Dealer Sales, Tank Wagon Prices, become effective in part of a Marketing Station area, fill in Marketing Station name, effective date, applicable prices and in the space to the right of Dealer Sales Prices fill in the place name of the communities in which said Dealer Sales Prices are effective.

B. When new Dealer Sales, Tank Wagon Prices, become effective in all of a Marketing Station area, fill in Marketing Station name, effective date and applicable prices and in the space to the right of Dealer Sales Prices, type in "All points."

Commission Schedule Based on Normal Retail Price Being 4.5¢ Above Dealer Sales Tank Wagon Price, and including Dealer Absorption of 20% of Any Reduction of Price Below Normal Retail and Dealer Retaining 80% of Any Authorized Add-On's Above Normal Retail

1¢ Delivery Differential

Cents Above Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)
Normal Retail	6.5	Normal Retail	6.5	3.1	5.83	6.1	5.28
.1	6.58	.1	6.48	3.2	5.86	6.2	5.26
.2	6.66	.2	6.46	3.3	5.84	6.3	5.24
.3	6.74	.3	6.44	3.4	5.82	6.4	5.22
.4	6.82	.4	6.42	3.5	5.8	6.5	5.2
.5	6.9	.5	6.4	3.6	5.78	6.6	5.18
.6	6.98	.6	6.38	3.7	5.76	6.7	5.16
.7	7.08	.7	6.36	3.8	5.74	6.8	5.14
.8	7.14	.8	6.34	3.9	5.72	6.9	5.12
.9	7.22	.9	6.32	4.0	5.7	7.0	5.1
1.0	7.3	1.0	6.3	4.1	5.68	7.1	5.08
1.1	7.38	1.1	6.28	4.2	5.66	7.2	5.06
1.2	7.46	1.2	6.26	4.3	5.64	7.3	5.04

1.3	7.54	1.3	6.24	4.4	5.62	7.4	5.02
1.4	7.62	1.4	6.22	4.5	5.6	7.5	5.0
1.5	7.7	1.5	6.2	4.6	5.58	7.6	4.98
1.6	7.78	1.6	6.18	4.7	5.56	7.7	4.96
1.7	7.88	1.7	6.16	4.8	5.54	7.8	4.94
1.8	7.94	1.8	6.14	4.9	5.52	7.9	4.92
1.9	8.02	1.9	6.12	5.0	5.5	8.0	4.9
2.0	8.1	2.0	6.1	5.1	5.48	8.1	4.88
2.1	8.18	2.1	6.08	5.2	5.46	8.2	4.86
2.2	8.28	2.2	6.08	5.3	5.44	8.3	4.84
2.3	8.34	2.3	6.04	5.4	5.42	8.4	4.82
2.4	8.42	2.4	6.02	5.5	5.4	8.5	4.8
2.5	8.5	2.5	6.	5.6	5.38	8.6	4.78
2.6	8.58	2.6	5.98	5.7	5.36	8.7	4.76
2.7	8.68	2.7	5.96	5.8	5.34	8.8	4.74
2.8	8.74	2.8	5.94	5.9	5.32	8.9	4.72
2.9	8.82	2.9	5.92	6.0	5.3	9.0	4.7
3.0	8.9	3.0	5.9				

1½¢ Delivery Differential

Cents Above Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)	Cents Below Normal Retail	Commissions (Cents)
Normal Retail	7.00	Normal Retail	7.00	3.4	6.32	6.8	5.64
.1	7.08	.1	6.98	3.5	6.3	6.9	5.62
.2	7.16	.2	6.96	3.6	6.28	7.0	5.6
.3	7.24	.3	6.94	3.7	6.26	7.1	5.58
.4	7.32	.4	6.92	3.8	6.24	7.2	5.56
.5	7.4	.5	6.9	3.9	6.22	7.3	5.54
.6	7.48	.6	6.88	4.0	6.2	7.4	5.52
.7	7.56	.7	6.86	4.1	6.18	7.5	5.5
.8	7.64	.8	6.84	4.2	6.16	7.6	5.48
.9	7.72	.9	6.82	4.3	6.14	7.7	5.46
1.0	7.8	1.0	6.8	4.4	6.12	7.8	5.44
1.1	7.88	1.1	6.78	4.5	6.1	7.9	5.42
1.2	7.96	1.2	6.76	4.6	6.08	8.0	5.4
1.3	8.04	1.3	6.74	4.7	6.06	8.1	5.38
1.4	8.12	1.4	6.72	4.8	6.04	8.2	5.36
1.5	8.2	1.5	6.7	4.9	6.02	8.3	5.34
1.6	8.28	1.6	6.68	5.0	6.	8.4	5.32
1.7	8.36	1.7	6.66	5.1	5.98	8.5	5.3
1.8	8.44	1.8	6.64	5.2	5.96	8.6	5.28
1.9	8.52	1.9	6.62	5.3	5.94	8.7	5.26
2.0	8.6	2.0	6.6	5.4	5.92	8.8	5.24

2.1	8.68	2.1	6.58	5.5	5.9	8.9	5.22
2.2	8.76	2.2	6.56	5.6	5.88	9.0	5.2
2.3	8.84	2.3	6.54	5.7	5.86	9.1	5.18
2.4	8.92	2.4	6.52	5.8	5.84	9.2	5.16
2.5	9.	2.5	6.5	5.9	5.82	9.3	5.14
2.6	9.08	2.6	6.48	6.0	5.8	9.4	5.12
2.7	9.16	2.7	6.46	6.1	5.78	9.5	5.1
2.8	9.24	2.8	6.44	6.2	5.76	9.6	5.08
2.9	9.32	2.9	6.42	6.3	5.74	9.7	5.06
3.0	9.4	3.0	6.4	6.4	5.72	9.8	5.04
		3.1	6.38	6.5	5.7	9.9	5.02
		3.2	6.36	6.6	5.68	10.0	5.
		3.3	6.34	6.7	5.66		
						9.1	4.68
						9.2	4.66
						9.3	4.64
						9.4	4.62
						9.5	4.6
						9.6	4.53
						9.7	4.56
						9.8	4.54
						9.9	4.52
						10.0	4.5

Receipt of copy acknowledged.
[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

STIPULATION

Whereas, on or about October 16, 1958, plaintiff served upon defendant "Plaintiff's First Request for Admissions"; and

Whereas, in open court at the hearing of defendant's Motion for Summary Judgment on October 20, 1958, the parties orally stipulated that Exhibits 1 and 2 attached to said Request for Admissions are true and correct copies of letters sent by R. H. Rath to Division Managers, Dealer Sales, of defendant and that in sending said letters said Rath was acting within the scope of his authority as General Sales Manager, Dealer Sales, of said defendant; and

Whereas, it was further orally stipulated between the parties that at the present time and for some time last past, following May 23, 1958, plaintiff has been and is in business as a retail service station dealer in Fresno, California, leasing the premises which he occupies from General Petroleum Corporation and buying and reselling the products of said General Petroleum Corporation.

Now, Therefore, It Is Hereby Stipulated that the foregoing oral stipulation made in open court concerning said Rath and said letters shall be deemed defendant's response to said "Plaintiff's First Request for Admissions" and it shall be further deemed that said defendant has denied each and

every one of said requests except to the extent heretofore stipulated.

It Is Further Hereby Stipulated that it shall be deemed that defendant's response to said Request for Admissions was made under oath in full compliance with F.R.C.P. Rule 34.

Dated: October 24, 1958.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant Union Oil Company of California.

[Endorsed]: Filed October 27, 1958.

[Title of District Court and Cause.]

ORDER

This, the defendant's motion for summary judgment, came on regularly to be heard, was argued orally and submitted. This court has examined the arguments adduced by both sides.

In the present posture of the case, it cannot be said that there is no genuine triable issue of fact. The plaintiff's case is extremely thin. Therefore,

in the absence of such a showing and until such time as further discovery may throw more light upon the alleged claim, it is hereby ordered that the motion for summary judgment be denied, without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion can be based.

It Is So Ordered.

Dated: October 30th, 1958.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed October 30, 1958.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT TO THE AMENDED COMPLAINT

Defendant Union Oil Company of California, without acknowledging the relevance or propriety of any of the allegations contained in the Amended Complaint, or acknowledging that any evidence is admissible respecting the issues tendered thereby, answers the amended complaint as follows:

1. Defendant admits the averments of paragraphs 2 and 3.

2. Defendant denies the averments of paragraphs 11, 12, 13, 14, 17, 18, the unnumbered paragraph (and all lettered subdivisions thereof) ap-

pearing under the heading "Effect of Violations," 21, 26, 28, 29 and 30.

3. Answering paragraph 1, defendant admits that during the period May 23, 1956, until May 22, 1958, plaintiff leased from defendant, and operated, a service station located at 4010 E. Ventura Avenue, Fresno, California. Except as so admitted, defendant denies the averments of said paragraph 1.

4. Answering paragraph 4, defendant admits that it is a corporation doing business in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, Nevada and Alaska and in the Territory of Hawaii; admits that it has assets in excess of three hundred million dollars; admits that it drills for, produces and imports crude oil. Except as so admitted, defendant denies the averments of said paragraph 4.

5. Answering paragraph 5, defendant admits that it operates petroleum pipelines in the States of California and Montana and that it leases ships designed to transport its crude oil and products along the seacoast of the West Coast of the United States. Except as so admitted defendant denies the averments of said paragraph 5.

6. Answering paragraph 6, defendant admits that it operates refineries in the State of California and a refinery in the State of Montana which refine oil into gasoline and other petroleum products; and admits that it operates at least four refineries in the United States, one at Wilmington, California,

one at Cutbank, Montana, one at Edmonds, Washington, and one at Oleum, California. Except as so admitted, defendant denies the averments of said paragraph 6.

7. Answering paragraph 7, defendant admits that it is a wholesale distributor of petroleum products; admits that it owns or operates bulk plant stations loated in California, Arizona, Oregon, Washington, Montana, Utah, Idaho and Nevada totalling approximately 400, admits that defendant sells products to wholesalers and to retailers located in said states and sometimes makes delivery of the products so sold from said bulk plants. Except as so admitted defendant denies the averments of said paragraph 7.

8. Answering paragraph 8, defendant admits that it owns and operates a number of gasoline transports in the eight western states named above and that some of said transports pick up petroleum products at transport terminals and deliver the petroleum products of defendant to retail outlets. Except as so admitted, defendant denies the averments of said paragraph 8.

9. Answering paragraph 9, defendant admits that it is engaged in selling gasoline at retail in the eight western states named above, admits that it has owned retail stations in said states and alleges that the number thereof has varied. Except as so admitted, defendant denies the averments of said paragraph 9.

10. Answering paragraph 10, defendant admits that there are service stations in the eight western States above named and that said retail outlets have been operated by independent businessmen; admits that defendant has acquired possessory interests in service station sites in said eight western states and leases such sites to others, and admits that most of said service station sites are leased or subleased by defendant to independent operators. Except as so admitted, defendant denies the averments of said paragraph 10.

11. Answering paragraph 15, defendant alleges that at some time prior to May, 1955, defendant "fair traded" gasolines sold under its brands as authorized by state laws and the Miller-Tydings amendment to the Sherman Act. Except as so alleged, defendant denies the averments of paragraph 15.

12. Answering paragraph 16, defendant alleges that shortly prior to May, 1955, defendant began entering into contracts with individual service station dealers entitled "Retail Dealer Consignment Agreement" pursuant to which defendant consigned to the dealer, as a factor defendant's gasolines, retaining the title thereto and paying to the dealer, upon the sale of said gasolines, a commission, with a minimum commission guaranteed. Alleges that a true copy of the Retail Dealer Consignment Agreement entered into by and between plaintiff and defendant is attached hereto and marked Exhibit A.

Except as so alleged, defendant denies the averments of paragraph 16.

13. Answering paragraph 19, defendant admits that plaintiff has been engaged in the wholesaling or retailing of gasoline since 1948; admits that at the time plaintiff became lessee of the service station located at 4010 E. Ventura, Fresno, said station had free and open access to the public, admits that commencing in November, 1957, highway construction began on the frontage of said service station. Except as so admitted, defendant denies the averments of said paragraph 19.

14. Answering paragraph 20, defendant admits that on April 9, 1957, plaintiff and defendant entered into a lease effective May 23, 1957, whereby defendant subleased the premises to plaintiff for a term of one year terminating on the 22nd day of May, 1958. Except as so admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph 20.

15. Defendant admits the averments of paragraph 22, and alleges that there are numerous other service stations competitive to said station.

16. Answering paragraph 23, defendant alleges that during the period 6:00 p.m. February 28, 1958, until 9:00 a.m. March 12, 1958, the price at which defendant as owner and consignor authorized plaintiff as consignee to sell defendant's "regular" gasoline was 29.9 cents per gallon; admits that at some

time during said interval of time plaintiff sold defendant's "regular" gasoline at 27.9 cents per gallon; denies that plaintiff requested authorization to do so, and denies that said request was denied. Except as so admitted and expressly denied, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph 23.

17. Answering paragraph 24, defendant admits that approximately one week later, Mr. W. S. Christopher, Division Sales Manager, Fresno, called on plaintiff and told him that he was violating the consignment agreement and informed plaintiff that he would do what he could to cause plaintiff to abide by the terms of the consignment agreement. Except as so admitted, defendant denies the averments of said paragraph 24.

18. Answering paragraph 25, defendant alleges that following said conversation plaintiff refused to comply with his obligations under the consignment agreement existing between the parties and persisted in selling defendant's gasoline at prices at variance with those authorized by defendant thereunder; admits that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant. Except as so admitted, defendant denies the averments of said paragraph 25.

19. Answering paragraph 27, defendant admits that plaintiff's lease has not been renewed. Except as so admitted defendant denies the averments of said paragraph 27.

Second Defense

On June 17, 1958, in an action in which defendant herein was plaintiff and plaintiff herein was defendant, the Superior Court of the State of California in and for the County of Fresno duly made and entered a judgment of which Exhibit B hereto is a true copy. Said judgment is now final, and by virtue thereof it has been adjudicated between the parties hereto that at all times after midnight, May 22, 1958, defendant herein was entitled to possession of the service station heretofore leased by it to plaintiff herein, plaintiff had no proprietary interest as a lessee which he could transfer to anyone, and plaintiff had no business or "good will" connected therewith.

Third Defense

If plaintiff Richard S. Simpson has suffered any damages by virtue of any relationship or contract with defendant asserted by plaintiff to be unlawful (all of which defendant denies), plaintiff may not recover therefor because he entered into it of his own choice and because he was a party thereto.

Wherefore, defendant prays that it be dismissed hence with its costs.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

EXHIBIT A

150-4089.

Retail Dealer Consignment Agreement

This Agreement made as of this 27th day of April, 1956, between Union Oil Company of California, a corporation, Consignor, and Richard S. Simpson, dba Simpson's Union Service, Consignee,

Witnesseth:

First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasolines as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at 4010 East Ventura Avenue, Fresno, California, on the terms and conditions hereinafter set forth.

Second: Consignee agrees that:

1. He will handle, advertise for sale and sell all gasolines delivered hereunder under Consignor's brands, trade-marks and names without adulteration and will maintain said brands, trade-marks and names on pumps and other facilities through which said gasolines are dispensed.

2. He will sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing.

3. He will, at his sole expense, furnish, maintain and operate all facilities and equipment and hire and pay the wages of all assistants he deems neces-

sary or desirable for the operation of his business and they shall be under his sole direction and control and he shall be solely responsible for their acts and omissions.

4. He will be exclusively liable for the payment of any and all withholding taxes on income, and any and all premiums, contributions and taxes, for workmen's compensation insurance, unemployment insurance, old age benefits, pensions, annuities and retirement benefit insurance, now or hereafter imposed by or pursuant to any federal or state law or regulation, which are measured by the wages, salaries or other remuneration paid by Consignee to persons employed in connection with the storage or sale of gasoline hereunder, whether or not Consignee's employees, together with any interest and penalty, or either thereon. He will indemnify and hold Consignor harmless from any liability for any such payments and he will reimburse Consignor for any such payments made by it.

In the event that any ruling, order or decision of an administrative agency or of a court holds that Consignee or a person in a relationship similar to Consignee's hereunder, is an employee for the purpose of federal or state unemployment insurance, old age benefit insurance or income tax withholding, he authorizes and will permit Consignor to deduct and withhold from his commissions payable hereunder, all sums necessary for payment of any and all withholding taxes on income and any and all unemployment and old age benefit insurance pre-

miums, contributions and taxes, federal or state, that are measured by such commissions, or by the aforesaid wages, salaries or other remuneration paid by Consignee; and he will reimburse Consignor for any payments by it of such premiums, contributions and taxes for which there has been no such previous deduction and withholding.

He will also indemnify and hold Consignor harmless from liability, claims or demands arising from death or injury to persons whether or not Consignee's employees, or from damage to property occurring in connection with the conduct of his business and will maintain adequate insurance against such liability.

5. He will pay for all expenses, costs, licenses, and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimburse Consignor therefor in the event the same be paid by Consignor in the first instance. He will also conduct his operations in strict compliance with all laws, ordinances and regulations of governmental authority.

6. He will be responsible to Consignor for all gasolines consigned to him, or for loss thereof or damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion

not caused by his negligence and will pay Consignor for all gasolines sold, lost or damaged as if said gasolines had been sold at Consignor's authorized retail prices then in effect, including applicable State and Federal taxes.

7. He will keep accurate records of all gasolines delivered hereunder, their disposition and price at which sold and will promptly account upon demand for all Consignor's monies and gasolines in his possession and pay Consignor for any shortage which may develop (except as provided in 6 above) at the then applicable authorized retail sale price and will not charge against funds or any property of Consignor for which he is accountable any monies due him from Consignor. Consignor will have the right at any reasonable time to check stock on hand and inspect and audit Consignee's records and accounts.

8. He will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds.

Third: Consignor agrees that:

1. It will consign and deliver to Consignee f.o.b. Consignee's place of business specified in Section First hereof, all gasolines to be delivered hereunder by such means as it may elect.

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's posted minimum retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof, plus $.015 per gallon provided, however, that:

a. When Consignor's authorized retail price for the sale of the gasoline hereunder in effect at the time and place of sale thereof is more than Consignor's posted minimum retail price for such gasoline in effect at the time and place of sale thereof, such commission shall be increased by the full amount of the difference between such posted minimum retail price and such authorized retail price.

b. When Consignor's authorized retail price for the sale of the gasoline hereunder in effect at the time and place of sale thereof, is less than Consignor's posted minimum retail price for such gas-

oline in effect at the time and place of sale thereof, such commission shall be reduced by an amount equivalent to fifty per cent (50%) of the difference between such authorized retail price and such posted minimum retail price.

Provided further, however, that in no event shall said Commissions be less than $.0595 for each gallon of 7600 Gasoline and $.0575 for each gallon of Royal 76 Gasoline.

3. It will pay the property taxes on all its gasolines in storage.

Fourth: Title to all gasolines consigned and delivered hereunder shall remain in Consignor until sold by Consignee as provided herein.

Fifth: The quantity of gasoline receipted for by Consignee shall be conclusive evidence of the quantity delivered and Consignee waives any claim against Consignor as to quantity, quality, commissions, credits, payment or settlement unless presented to Consignor in writing within ten (10) days after such delivery, sale, settlement or payment.

Sixth: All sales made by Consignee shall be for cash on delivery, provided, however, that sales may be made upon credit to specified accounts or customers holding and presenting a valid and unexpired Union Oil Company of California national credit card or valid and unexpired credit card of companies from time to time specifically authorized in writing by Consignor, but only within the credit limits and terms of sale as authorized by said credit

cards. Consignor may revoke such authority at any time.

If credit sales are made either above the authorized credit limit or not in accordance with the authorized terms of sale, Consignee will account to Consignor therefor in cash on demand or Consignor may deduct this amount from any commissions, monies or anything of value in its possession belonging to or due Consignee.

Seventh: Consignor may, at its option, withhold commissions, monies or anything of value in its possession belonging to or due Consignee for the purpose of reimbursing itself for any indebtedness due from Consignee.

Eighth: This agreement will be for term commencing the 23 day of May, 1956, and ending the 22 day of May, 1957, and from year to year thereafter until cancelled by either party at the end of the initial term or of any subsequent contract year upon at least 30 days written notice to that effect. This agreement shall cease and terminate upon any termination of Consignee's right to occupy the premises described herein.

Ninth: In the event of any breach hereof, Consignor may revoke and terminate this agreement immediately and thereupon all consigned gasolines shall be returned to Consignor and all sums due shall be paid immediately.

Tenth: This agreement may not be assigned or transferred by Consignee without Consignor's writ-

ten consent and may not be assigned by operation of law.

Eleventh: Deliveries hereunder shall be subject to interference or delay resulting from causes beyond Consignor's reasonable control.

Twelfth: This agreement shall terminate and supersede, as of the commencement date hereof, all prior agreements between the parties covering the sale and delivery of gasoline for resale at the place of business above specified. This agreement covers all the terms agreed upon by the parties and no employee or representative of Consignor has authority to change or modify its terms nor to make any statements, representations, promises or agreements not herein contained.

In Witness Whereof, the parties hereto have caused this agreement to be executed as of the day and year first above written.

UNION OIL COMPANY OF CALIFORNIA,

By /s/ W. S. CHRISTOPHER,
District Sales Manager,
Consignor.

By /s/ RICHARD S. SIMPSON,
Consignee.

Union Oil Company of California
425 First Street, San Francisco 20, Calif.

150.

Mr. Richard S. Simpson,
4010 E. Ventura Ave.,
Fresno, California.

Service Station LC-4089.

Dear Mr. Simpson:

Referring to that certain Retail Dealer Consignment Agreement between us dated 4/27/56, it is hereby mutually agreed that effective September 11, 1956, Paragraph 2 of Section Third of said agreement shall be and the same is hereby modified and amended to read and provide as follows:

"2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's Posted Minimum Retail Price for the gasoline in effect at the time

and place of sale exceeds Consignor's Posted Tank Wagon Price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof Plus $.015 per gallon provided, however, that when Consignor's Authorized Retail Price for the sale of the gasoline hereunder in effect at the time and place of sale thereof is more than Consignor's Posted Minimum Retail Price for such gasoline in effect at the time and place of sale thereof, such commissions shall be increased by the full amount of the difference between such Posted Minimum Retail Price and such Authorized Retail Price; provided further, however, that in no event shall said commissions be less than $.066 for each gallon of 7600 Gasoline and $.071 for each gallon of Royal 76 Gasoline."

As herein modified, all the terms and provisions of said Agreement shall remain in full force and effect.

Kindly signify your agreement hereto by signing the duplicate hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By /s/ W. S. CHRISTOPHER.

Accepted and Agreed to:

By /s/ RICHARD S. SIMPSON.

Date 9/20/58.

EXHIBIT B

Certified Copy.

In the Superior Court of the State of California
in and for the County of Fresno

No. 102,048

UNION OIL COMPANY OF CALIFORNIA,
a Corporation,

Plaintiff,

vs.

RICHARD S. SIMPSON,

Defendant.

JUDGMENT

This cause having duly and regularly come on for hearing before the Court on June 17, 1958, plaintiff Union Oil Company of California, appearing by Messrs. Avery, Maux and Gallagher, and the default of defendant Richard S. Simpson having been duly and regularly entered, and the plaintiff having introduced oral and documentary evidence, and having waived its claims for damages and costs, and the Court having considered the evidence and good cause appearing:

It Is Hereby Ordered, Adjudged and Decreed that at all times after midnight May 22, 1958, plaintiff Union Oil Company of California was entitled to possession of that certain service station located at the southeast corner of Ventura and Tenth Streets, Fresno, California, and known as Union Oil

Service Station No. 4089, together with the buildings, improvements and equipment thereon more fully described in the complaint on file herein, and said plaintiff is hereby restored to the possession of said property.

Done in open Court this 17th day of June, 1958.

MILO POPOVICH,
Judge of the Superior Court.

The foregoing instrument is a correct copy of the original on file in this office.

Attest: June 17, 1958.

J. L. BROWN,
County Clerk;

By /s/ [Indistinguishable],
Deputy.

Receipt of copy acknowledged.

[Endorsed]: Filed November 24, 1958.

[Title of District Court and Cause.]

ORDER

Defendant objects to plaintiff's First Interrogatories upon the grounds that they are irrelevant, not calculated to lead to the discovery of admissible evidence, burdensome, vexatious and oppressive. Said interrogatories were served on defendant prior to July 3, 1958, on which date plaintiff filed an amended complaint alleging certain violations of

Sections 1 and 2 of the Sherman Act and resultant damage to plaintiff. On October 30, 1958, defendant's motion for summary judgment was denied in an order made by Judge Edward P. Murphy, now deceased. Judge Murphy's order reflected an opinion that although plaintiff's case was "extremely thin" it could not be said at that time that there was no genuine triable issue of fact. Summary judgment was denied without prejudice to renewal of the motion after further discovery.

The interrogatories to which objection is now made are designed to obtain from defendant a detailed description of its production, distribution and sale of gasoline in eight western states, Alaska and in the Territory of Hawaii. Although obviously burdensome it would seem that defendant's answers might be productive of facts which are material and admissible as evidence, or calculated to lead to the discovery of admissible evidence in regard to the alleged violation of Antitrust laws. However, it is believed that defendant should not be required to answer the interrogatories in question at this time.

On November 24, 1958, defendant filed an answer to the amended complaint which answer contains certain detailed admissions with regard to its production, distribution and sale of gasoline in eight western states, Alaska and the Territory of Hawaii. It is probable that these admissions will be sufficient to establish many of the ultimate facts which are essential to plaintiff's cause of action and to which his interrogatories were directed. The validity of

this assumption should be considered by plaintiff in the preparation of interrogatories during the course of future discovery.

In addition to doubt as to the extent of plaintiff's need for the information sought by the interrogatories there is more persuasive reason for allowing defendant to defer response. The nature of "further discovery," contemplated by Judge Murphy's order of October 30, 1958, cannot be determined from a reading of the order. It is apparent, however, that uncontrolled discovery would be unreasonable. Until issues have been identified and the possibility of stipulation explored no informed judgment can be exercised by this court. A pretrial conference, or a series of such conferences will advantage both litigants and the court.

Therefore, defendant's objections to plaintiff's First Interrogatories are sustained without prejudice to plaintiff's right to renew his request for answers after a pretrial conference has accomplished the objectives mentioned herein. Any pretrial memorandum filed by plaintiff pursuant to Rule 16 of this district shall include the nature of evidence upon which he will rely as proof of damage. Legal authorities in support of the theory regarding admissibility of such evidence will also be included.

Dated: January 6, 1959.

/s/ LLOYD H. BURKE,
United States District Judge.

[Endorsed]: Filed January 7, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated, by and between the parties hereto, as follows:

1. Defendant will permit plaintiff to inspect the following documents, if they exist and can be located in its possession by reasonable search, other than privileged communications:

(a) Policy letters or policy memoranda, signed by R. H. Rath, with respect to the institution of retail consignment and maintenance thereof until the filing of the complaint herein;

(b) Policy letters or policy memoranda, signed by R. H. Rath, with respect to the establishment or maintenance of a policy of defendant respecting the duration of leases with service station dealers from July 2, 1951, until the filing of the complaint in this action;

(c) All letters, memoranda and records, signed by R. H. Rath, pertaining to the plaintiff and to the operations of the service station involved in this case during the period plaintiff was the lessee of said station.

2. Defendant will furnish plaintiff, if requested by him and at his expense, with a copy of any document made available to plaintiff pursuant to paragraph 1 above.

3. Plaintiff hereby waives his right to take the deposition of R. H. Rath.

4. Subject to approval by R. H. Rath, Moses Lasky and Richard Haas hereby agree to accept service of a subpoena directed to R. H. Rath requiring him to appear at the trial of this cause, provided said subpoena is served not less than 20 nor more than 40 days prior to the time specified therein for the appearance of R. H. Rath. Should such a subpoena be so served, it shall be deemed served on R. H. Rath personally wherever he is then located, and defendant and said Rath hereby waive any claim that the subpoena cannot be validly served beyond the territorial boundaries specified in R.C.P. Rule 45(e).

Dated: February 13, 1959.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

To be filed on signature of R. H. Rath.

Paragraph 4 agreed to:

/s/ R. H. RATH.

[Endorsed]: Filed March 11, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

To: The defendant Union Oil Company and its attorneys, Brobeck, Phleger and Harrison, Moses Lasky and Richard Haas:

Plaintiff requests defendant within ten days after the service of this request to admit for the purposes of this action only the truth of the following facts:

1. That R. H. Rath was acting as General Sales Manager, Dealer Sales, of the defendant in April, 1957.

2. That R. H. Rath was acting with the knowledge of the defendant in giving the testimony referred to in Request No. 3.

3. That the questions and answers attached hereto as Exhibit No. 1 herein were asked and answered by R. H. Rath before the Select Committee on Small Business, House of Representatives, 85th Congress, 1st Session, Subcommittee No. 5 in Los Angeles, California, in the latter part of April, 1957.

4. That the following letter is a true, genuine and correct copy of the letter sent by R. H. Rath to Mr. James Roosevelt:

"Union Oil Company of California,
Los Angeles, April 25, 1957.

Re: Los Angeles Hearings, April 24, 1957, answers to two questions asked by the subcommittee during testimony of R. H. Rath, sales manager, dealer sales, Union Oil Company of California

Mr. James Roosevelt,
Chairman, Subcommittee No. 5, Select Committee on Small Business, House of Representatives of the United States, Courtroom of United States Court of Appeals, 16th Floor Federal Building, Los Angeles, Calif.

Dear Sir:

During the course of the testimony of the undersigned, R. H. Rath, sales manager, dealer sales, Union Oil Company of California, two questions were asked and I agreed to supply the answers by letter after inquiry.

Herewith are the questions and answers:

Question No. 1. What are the names and locations of the independent refineries in the Pacific Coast marketing area?

Answer. The following list shows those independent refineries in California as far as known to the undersigned:

Name	Refinery Location
Bankline Oil Co.	Bakersfield
Caminol Co.	Hanford
Century Oil Co. (Calstate Refining Co.)	Signal Hill Long Beach
Douglas Oil Company of California	Bakersfield
Do.	Paramount
Edgington Oil Refineries, Inc.	Long Beach
Envoy Petroleum Co.	Do.
Fletcher Oil Co.	Wilmington
Golden Bear Oil Co.	Bakersfield
Hancock Oil Company of California	Signal Hill
Macmillan Petroleum Corp.	Long Beach
Mohawk Petroleum Corp.	Bakersf
Newhall Refining Co.	Newhall
Palomar Oil & Refining Corp.	Bakersfield
Rothschild Oil Co.	Santa Fe Springs
Socal Oil & Refining Co.	Huntington Beach
Sunland Refining Co.	Bakersfield
Sunset International Petroleum Corp.	Torrance
Wilshire Oil Co., Inc.	Norwalk

In addition to the above list, the United States Refining Co. is currently building a refinery at Tacoma, Wash., which should be onstream in the very near future. We should also like to call attention to the attached news clipping outlining the Wilshire Oil Co.'s plans for a refinery in the Hawaiian Islands. There have also been recent press releases outlining plans by Cal-Mex Oil & Refining Co. for a $27 million refinery in the San Diego area.

Question No. 2. How does Union Oil Company of California distribute or merchandise wholesale deliveries of gasoline to unbranded refineries and jobbers outside Union's own distribution system? Is it by posted prices, negotiation or what?

Answer: A. Union makes deliveries of gasoline to unbranded refiners or jobbers outside of its own distribution system by:

1. Pipeline to customer's storage.

2. Pipeline to customer's tanker or barge.

3. Into customer's transport truck, into common carrier trucks or tank car, f.o.b. Union's refinery and/or terminals.

B. Prices for delivery under A 1 and 2 are established by negotiation for each delivery. Prices for delivery under 3 are either negotiated on the basis of a discount off Union's posted price for 7600 gasoline or on the basis of a firm quotation for spot deliveries; if for continuing deliveries, provision is made for subsequent review as necessary.

We trust that the above sufficiently answers your questions.

Very truly yours,
R. H. RATH,
Sales Manager, Dealer Sales."

5. That the answers of R. H. Rath set forth in Request No. 3 above would be given to the same questions if asked in the above-entitled action.

6. That defendant sold in excess of ten million dollars of its gasoline to its consignee dealers in the United States in each of the years 1956, 1957 and 1958.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

EXHIBIT No. 1

The committee will now hear from Mr. Rath, Union Oil Co.

Mr. Hauk: I take it the committee has no objection if counsel sits with Mr. Rath?

Mr. Roosevelt: Not at all. If you are going to answer questions by the committee, then I would like to swear you at the same time and have you identify yourself to the reporter. In fact I think we will do that just to save time. Would you both raise your right hands, please?

Do you solemnly swear that the testimony you are about to give before this committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Rath: I do.

Mr. Hauk: I do.

Testimony of Robert Rath, Sales Manager, Dealer Sales, Union Oil Company of California, Accompanied by A. Andrew Hauk, Attorney, Los Angeles, Calif.

Mr. Roosevelt: Mr. Rath, would you identify your counsel?

Mr. Rath: This is Mr. Hauk, our counsel.

Mr. Roosevelt: Your address, sir?

Mr. Rath: 617 West Seventh Street, Los Angeles.

Mr. Roosevelt: Won't you sit down, sir? My understanding is that you have a short statement which you wish to give to the committee.

Mr. Rath: Yes, I do.

Mr. Roosevelt: Then is the letter that accompanies it to be made a part of the record?

Mr. Rath: Yes. We have submitted two statements, one of which is confidential.

Mr. Roosevelt: Is the accompanying letter the confidential one?

Mr. Rath: Yes. One is headed "Statement of Union Oil Company of California Before Subcommittee No. 5."

Mr. Roosevelt. That is not confidential. I want to make sure because you have only submitted one copy.

Mr. Rath: We are sorry. We thought we sent six over, but somehow some of them have gone astray.

The one addressed to you is the confidential one.

Mr. Roosevelt: All right, sir. The committee will accept the confidential statement and try to make other copies available for the press, because this is an open hearing, and we don't want to keep anything from them which is part of the open hearing.

(The document referred to will be found in the files of the subcommittee.)

Mr. Roosevelt: Will you proceed, Mr. Rath?

Mr. Rath: Gentlemen, my name is Robert Rath. I am sales manager, dealer sales, for Union Oil Company of California. This statement is made in response to the chairman's letter to us of March 29, 1957, which sets forth certain specific areas of questions. Insofar as this statement covers information outside of my own responsibilities, it is based upon

information supplied at my request which I believe to be accurate.

1. We are asked to submit all contracts which we may have with manufacturers of TBA products. We have no contractual arrangements with any such manufacturers.

Next we are asked what percentage of our overall business is represented by TBA. The company's revenue from TBA sales is less than 0.2 of 1 per cent of the company's total revenue.

2. We are asked to indicate what specific changes have been made in our leases, franchises, agreements, and arrangements with our dealers since 1955.

The rental clause in our service-station leases has been modified.

Mr. Roosevelt: And that is the only change, Mr. Rath?

Mr. Rath: Yes.

Mr. Roosevelt: How has it been modified?

Mr. Rath: We have a gallonage rental in our lease, and in addition, we have added a minimum. That minimum is now changed so that he pays 2 cents a gallon or, at our option, upon 30-day notice, he pays a flat rental. The flat rental is predicated on complete amortization of our facilities and our interest in the land and 7 per cent interest, so at the option of our management we may elect, on 30 days' notice, to invoke the flat rental.

Mr. Roosevelt: That is based upon the gallonage of the station that you think it ought to make.

Mr. Rath: It is based on the gallonage that was obtained the previous year, divided by 12 for a

monthly figure, and in case of a new station, it is on the basis of 2 cents a gallon, and the minimum is based on estimated gallonage.

Mr. Roosevelt: You still have a predominance then or almost exclusively 1-year leases.

Mr. Rath: Yes, we do, and they are based on 2 cents a gallon, Mr. Roosevelt. The only change made was that we may elect to invoke a flat rental.

Mr. Roosevelt: And you have not considered it worthwhile, as the previous witness did, to consider a change in either the length of the lease or cancellation clauses of the lease.

Mr. Rath: Yes, we have that under study. I meet probably five times a month with groups of dealers, usually 15 at a time, and I propose this question to them in each case to get their opinion. So far very few have expressed a desire for a longer term lease, but I discussed it in Honolulu last week and in Los Angeles the week before and San Francisco the week before, and if there is a real interest on the part of our dealers for a longer term lease, we will go ahead with one.

Mr. Roosevelt: But as of this time you have no longer term leases.

Mr. Rath: They are all 1-year leases.

Mr. Roosevelt: Thank you. You may proceed.

Mr. Rath: 3. You ask for a list of our various types of dealer agreements and for specific information regarding company operated stations and consignment agreements. Dealers in Union Oil products either buy gasoline or take it on consignment. Union has no purchase or sale agreement with those who purchase its gasolines. With those who handle its

gasoline on consignment, Union has consignment agreements. Copies of Union's service station lease form and retail consignment agreement have been submitted to this committee. In addition there is submitted herewith a copy of Union's so-called Paint agreement.

Consignee commissions are discussed later.

Union has only 20 employee-operated service stations. These are maintained for training and experimental purposes.

4. You asked us to submit a breakdown showing the different types of dealers in each State in which we operate. The following is such a breakdown.

	Employee operated	Retail consignees	Purchase and sale	Total
California	17	2,149	370	2,536
Oregon		410	140	550
Washington	2	436	296	734
Nevada		57	26	83
Arizona	1	134	70	205
Total	20	3,186	902	4,108

Of the foregoing, the following operated under leases from Union:

California	1,536
Oregon	239
Washington	337
Nevada	36
Arizona	113
Total	2,261

Mr. Roosevelt: Mr. Rath, do you have any commission stations?

Mr. Rath: We call them consignee stations. I imagine that is what you refer to. Yes, retail con-

signees total in the figure that is supplied you, 3,186.

I guess the terminology in our case is consignee stations. Possibly in your case you call them commission stations.

Mr. Roosevelt: Is that an increase over what you had at this time last year?

Mr. Rath: Not appreciably. There have been gradual increases, yes, but we started our consignment program a little over 2 years ago, and we have probably put most of these fellows on a consignment basis with us, signed agreements with them, prior to 1956, although there has been an addition to that number in 1956.

Mr. Roosevelt: Have you been opening up new consignee stations, or have you been converting lessee stations to consignee stations?

Mr. Rath: There have been both.

Mr. Roosevelt: Both?

Mr. Rath: Yes.

Mr. Roosevelt: All right, sir.

Mr. Rath: Shall I proceed?

Mr. Roosevelt: Would you, please?

Mr. Rath: 5. You asked if we buy and sell TBA items to dealers as distinguished from No. 1, and indicate percentage of dealers handling noncompany TBA items. Union does not buy and sell TBA items to dealers.

6. You ask that we state our policy in regard to the market prices at the retail level. Our policy is to maintain competitive prices. In this connection Union's Royal 76 customarily commands a premium of an extra cent per gallon.

Mr. Roosevelt: Before we go into that, you state that you do not sell TBA items to your dealers, but you do have 0.2 of 1 per cent of the company's total revenue in that category. From where do you get the revenue?

Mr. Rath: From TBA suppliers who pay us a commission.

Mr. Roosevelt: You mean they pay you a commission to allow them to contact your dealers?

Mr. Rath: No; they pay us a commission for the services we perform in promoting the sale of TBA. It is a customary procedure in the industry.

Mr. Hosmer: Promoting the sales to the service-station operators or the public? Wholesale or retail?

Mr. Rath: On the basis of their sales to the service-station operator.

Mr. Hosmer: For the wholesale sales?

Mr. Rath: Yes.

Mr. Hosmer: That you promote amongst your dealers. You don't promote amongst the general public, is that right?

Mr. Rath: Well, we do it both ways. For example, on our credit cards we allow the credit for TBA items to be put on that, and we will go ahead and have advertising, promoting TBA to the consumer through our credit card stuffers and through other means of advertising. We promote various sales programs, embracing TBA sales, performing functions that way, in addition to holding training sessions, doing many things with the dealer so that

he in turn will increase his sales of TBA which are quite a function of his income.

Mr. Roosevelt: This is all by oral agreement?

Mr. Rath: Yes; it is.

Mr. Roosevelt: You have no contractual agreement at all. Could you detail that a little bit for us? For instance, do you sell some other company's tires in your Union Oil stations and take an override on those tires, or what items are we talking about?

Mr. Rath: In our dealer stations, Mr. Roosevelt, sales made by Firestone, U. S. Tire & Rubber, are totaled up by them each month, and they pay us a commission on their sales to the dealers, but that is all in oral agreement. Then we in turn——

Mr. Roosevelt: You mean the amount of commission was arrived at by oral agreement?

Mr. Rath: Yes, yes. Then we in turn, in our instructions on credit cards, point out to the dealer that these are authorized items that may be placed on our credit cards. In other words we will carry the retail credit on them. We do not carry the wholesale credit. That is a matter between the tire supplier and the service-station operator.

Mr. Roosevelt: And you carry a fairly complete line of TBA products on that credit-card arrangement?

Mr. Rath: We carry anything that is necessary for the operation of a car, that's right.

Mr. Roosevelt: Do you carry competing items, or are there exclusive arrangements?

Mr. Rath: There is no exclusive arrangement.

All we say is that we authorize Firestone, U.S. Tire & Rubber, and Prestolite batteries, for example, to be put on our credit cards. We have no way of controlling that because they might sell, say, General Tires and list it on the credit card, and it would go through, and we would carry the credit, but that isn't our intent when we supply credit by means of retail credit cards.

Mr. Roosevelt: That is what I am trying to get at. In other words, let's say the dealer decides he doesn't like Prestone, he likes something else. Can he ask you and will you agree then to allow him to include on his credit card with his customers that particular item if you have approved it?

Mr. Rath: No. Our instructions are that he should not put it on, but I know very well that considerable amount of it does go on. We have no way of policing it, and we don't attempt to.

Mr. Hosmer: Do you make money or lose money or break even on the TBA?

Mr. Rath: On the commission?

Mr. Hosmer: Yes.

Mr. Rath: The commission falls far short of covering our expenses in supervisory help, credit-card assistance, and so on. That is given for the sale of TBA.

Mr. Hosmer: Do you carry this on for the matter of having the necessary supplies and services in your stations that the public wants?

Mr. Rath: That's right. We are a quality house. We feel we should have first-class service stations. The reason that we nominate for credit-card use

Firestone and U. S., for example, is that they are topflight tires, and they have topflight accessories and batteries.

Mr. Hosmer: When your dealers sell those tires, can they sell them on a 6 months' basis or something like that?

Mr. Rath: That's right, we provide budget terms.

Mr. Hosmer: On those budget terms, is there an interest charge or not?

Mr. Rath: We have the best deal in the business. We charge a dollar carrying charge for the whole 3 months and a dollar and a half for a 5 months' carrying charge. That is all that the customer pays. We provide a budget form that the dealer fills out at the time he makes the sale. That goes into our office, and he receives credit for it.

Mr. Hosmer: Does the dealer get credit for the total amount of that sale then, or does he get credit as the purchaser pays over the next——

Mr. Rath: He gets credit right then. He usually turns that slip in on a gasoline delivery for credit. In other words, he collects all his credit-card tickets, turns that in, and then pays us the difference between that and the amount of gasoline delivered.

Mr. Hosmer: In other words, the Union Oil Co. picks up the difference between the $1 or $1.50 service charge and the interest on that amount of money for the length of time it takes to pay it.

Mr. Rath: We get $1 for 3 months and $1.50 to carry the account for 5 months, and that comes from the customer.

Mr. Nellis: What is the consideration for this commission you get?

Mr. Rath: You mean what do we do in the way of performance to earn it?

Mr. Nellis: I don't want you to repeat your testimony. You just said, for instance, that the matter of extending credit on cards is an important factor. I suppose you would consider that to be one of the considerations, but you also said that a lot of competitive merchandise slips through on the credit cards. What does the Firestone or U. S. Rubber Co. get from you to warrant their payment to you of a commission?

Mr. Rath: I already pointed out the credit-card sales. If we didn't carry it, I am sure that a tire supplier would have to, because it amounts to such a substantial quantity that the average dealer wouldn't be able to handle that. In addition, we hold monthly merchandising meetings on a conference basis. We also provide material, as I say, to all of our charge customers, pointing out just what we are doing in the way of TBA sales. In June, for example, we are featuring tires to get ready for the July 4 kickoff program, and all of that month our emphasis on retail will be centered around tires. This month it is accessories. We will hit winterizing items in November, so our retail efforts from my level on down are all directed during that month in our merchandising to that one particular product.

Mr. Nellis: I think you can answer this question yes or no—is your company one of the defendants

in the FTC case on this override commission matter?

Mr. Rath: No; we are not.

Mr. Nellis: Thank you.

Mr. Roosevelt: Would you proceed, Mr. Rath?

Mr. Rath: You ask what level of margin to the dealer we consider necessary to maintain in price-war cases. In the case of dealers taking delivery by truck and trailer our policy is to maintain a margin or commission of 6.6 cents per gallon and 7.1 cents per gallon, respectively, on our 2 grades of gasoline. In cases of price wars we do make price concessions to a purchase and sale account. No price concession is necessary in the case of consignment.

Mr. Roosevelt: Now, Mr. Rath, I don't think you mean to make the statement that you maintain 6.6 and 7.1 through the price war, do you?

Mr. Rath: Yes; we do, Mr. Roosevelt.

Mr. Roosevelt: You do.

Mr. Rath: That is a guaranteed minimum margin.

Mr. Roosevelt: Guaranteed minimum margin.

Mr. Rath: That is before rent.

Mr. Roosevelt: Yes. The rent comes out of that. But all through the price war—is it upon request of the individual station that he gets this concession, or is it upon your decision as to which station it shall be made to, and is it given to every station, regardless of whether in the price war they agree to meet competition?

Mr. Rath: I want to answer that by saying we are talking about two types of stations. One is a

consignment station, and the other is a purchase and sale.

Mr. Roosevelt: Leaving out the consignment station.

Mr. Rath: On the purchase-and-sale arrangement, I think we can do it best by penciling it out, but in the event, say, that a normal price is 31.2 in Los Angeles, which we consider normal today, and there is a depressed price condition, and our consignee stations sell, at, say, 29.9, which is 1.3 below that, we would then, in the event a purchase-and-sale service station elected not to lower its price, allow him 1.3 cents per gallon, even though he did not lower his price.

Mr. Roosevelt: So you are telling the committee that in all cases Union Oil gives the discount to a lessee station whether or not the price is lowered by that station.

Mr. Rath: On dealer stations. Lessee stations, if you are going to refer to them that way, Mr. Roosevelt, are, as I recall, either—well, we may have four-tenths of 1 per cent the last time I heard, not on consignment and I understand he is on consignment now, so I believe, in fact, 100 per cent of our so-called lessee stations, other than 2 parties, are on consignment. So, when we are talking about a purchase-and-sale arrangement, we are talking about—well, you might refer to your reseller type of dealer other than lease station.

Mr. Roosevelt: In order that I can get completely clear on that, the consignee stations, of which you have 3,186 out of your total of a little

over 4,000, these are what we commonly refer to as commission stations.

Mr. Rath: Yes; they are referred to as commission stations, too.

Mr. Roosevelt: You only have 902 that would be classified normally as lessee or dealer stations.

Mr. Rath: Not lessee; that would be classified as a dealer station, not necessarily lessee. You see, we have two basic classes of dealers in the industry. You have your lease account, that is, you might say, leased by the oil company to an operator.

Mr. Roosevelt: How many of those do you have?

Mr. Rath: We have 2,261.

Mr. Roosevelt: All right. You see, I don't quite add them up. Maybe I am wrong. In your paragraph 4 you have a total of 2,261 that you now tell me are people that lease their stations from you.

Mr. Rath: That's right.

Mr. Roosevelt: Previously you also list 3,186 that you call consignee.

Mr. Rath: We have a number of dealers who are retail consignees; they have converted to the consignment program. They are not lease stations; they are dealer stations, but they have converted to the consignment program, and we included them as retail consignees, because they are not a purchase-and-sale arrangement, you see.

Mr. Roosevelt: How many do you have on pure purchase-and-sale arrangement? Do I add the 2,261 to the 902?

Mr. Rath: On purchase and sale we have 902,

as listed in this document, and they would all be dealer service stations. They own their own service stations and simply buy gasoline from us and sell to the public.

Mr. Roosevelt: All right. On the 3,186, how many lease from you but are not on the consignee arrangement?

Mr. Rath: I don't know of any.

Mr. Roosevelt: How many total do you have that lease from you and operate independently?

Mr. Rath: 2,261, the figure that is in that lower column.

Mr. Roosevelt: Then they certainly don't add up to 4,108 total stations. If they do, explain to me how. You tell me there are 3,186 stations. Then you tell me there are 2,261 that are lessee independent stations that are not consignees, and that adds up to over 5,000, no matter what school you went to.

Mr. Rath: If you take the 2,261, that should be subtracted from the 3,186, the retail consignees. They are included as part of those. Then the balance——

Mr. Roosevelt: So, direct consignees, you have less than 1,000.

Mr. Rath: 925.

Mr. Roosevelt: 925.

Mr. Rath: Dealer stations that are on consignment; that's right.

Mr. Roosevelt: That makes the picture much clearer. So now I have 2,261 dealers that we are talking about here on page 3, under your paragraph 6.

Mr. Rath: I am talking about both groups when I talk about 6.6 and 7.1. Any of our dealers are guaranteed a minimum margin of 6.6 and 7.1, regardless of the retail price.

Mr. Roosevelt: Wait a minute, Mr. Rath. You add the sentence, "No price concession is necessary in the case of consignment," and you have just told me that you only had 925 consignment stations.

Mr. Rath: No, sir. Could I come up there? Would that help, if I pointed the figures out to you?

Mr. Roosevelt: Start all over again. Start out with the total number of stations, total number of consignees, total number of people that you are referring to on page 3 in paragraph 6.

Mr. Rath: We have 4,108 resellers.

Mr. Roosevelt: That is the total.

Mr. Rath: Of those, 2,261 are leased service stations. That figure is in the lower section. So that means that we have 1,847 other types of stations.

Mr. Roosevelt: All right.

Mr. Rath: Now, we have 20 employee-operated stations. If you subtract those, you have 1,827 dealer-operated stations, nonleased. Now, of those 1,827, 902 are on a purchase-and-sale arrangement, as shown in this tabulation, so that leaves 925 dealer-operated service stations on consignment.

Mr. Roosevelt: All right. Now explain to me what your purchase-and-sale arrangement is.

Mr. Rath: As we pointed out earlier, we have no contractual arrangement at all with a purchase-and-sale dealer. We have a payment agreement, and

that is all. That is simply where we deliver the gasoline, collect the money for it, either on c. o. d. or on credit, and then he——

Mr. Roosevelt: They pay the tank-wagon price.

Mr. Rath: They might pay truck and trailer if they have storage for it. They may take truck-and-trailer delivery, they might take tank-wagon delivery, but they purchase it, and it is their gasoline, and they resell it from then on. Now, if they go on the consignment program, then they go into this column called retail consignee.

Mr. Roosevelt: The ones I am interested in are these 2,261.

Mr. Hosmer: Let me ask a question about that. Your people who lease stations, do some of them operate on a purchase and sale and some of them operate on a consignment?

Mr. Roosevelt: Nine hundred and two operate on purchase and sale, 2,261 do not; is that correct?

Mr. Rath: No. Let us put it this way: All the leased stations except in Hawaii are on consignment.

Mr. Hosmer: Then we have 2,261 lessees on consignment as well as 925 other people.

Mr. Rath: Right. That totals your 3,186.

Mr. Hosmer: How many do you have over in Hawaii?

Mr. Rath: About 102, total.

Mr. Roosevelt: In effect, they are all on consignment; the 3,186 are all on consignment.

Mr. Rath: All of the lease stations in effect are on consignment; that's right.

Mr. Roosevelt: All right. Therefore, the price concession is not necessary in their case; is that correct?

Mr. Rath: That's right.

Mr. Roosevelt: So the ones you referred to as maintaining a margin or commission of 6.6 and 7.1 are relatively insignificant, practically none.

Mr. Rath: But the guaranteed commission to the dealer on consignment is also 6.6 and 7.1. That is the commission we pay him to sell our gasoline.

Mr. Roosevelt: Yes; but a price war doesn't affect him at all, because he is going to get his 6.6 and 7.1 no matter what.

Mr. Rath: It affects him in this respect: If there is no price war and the market is such that it is above so-called normal price, he may have a longer margin than a 6.6 and 7.1. If he elects to take that price on up to a competitive level, his margin may be longer than that; so the price war might affect him in that it drops the margin, but it will never drop it to more than 6.6 or 7.1, whether he is a purchase-and-sale dealer, whether he is a consignee dealer, or whether he is a consigned lessee.

Mr. Roosevelt: Who sets the price in your consignment station, dealer consignment station?

Mr. Rath: We do.

Mr. Roosevelt: You do?

Mr. Rath: Yes. We do it on this basis: You see, he is paid a commission to sell these products for us. Now, we go out into the market area and find out what the competitive major price is, what that level is, and we set our house-brand price at that.

As I say, I could take you into some markets where these fellows are making an 8-cent margin on both grades.

Mr. Roosevelt: That is because you allow them to, because you set the price for them; is that correct?

Mr. Rath: We explain it to them this way: That we are not setting the price; competitive factors are setting the price; and if major competition in the area is getting an 8-cent margin, in the basis of our calculations, he is going to get it.

Mr. Roosevelt: Yes; but basically this is not an independent businessman from the point of view that he sets his retail price as, for instance, the gentleman from Standard Oil testified. Here you set the price, and he is guaranteed a fixed margin below which he cannot go and occasionally at the price that you said he makes a little more.

Mr. Rath: We have a number of dealers, Mr. Roosevelt, who don't elect to sell at our nominated price. They take it on up above.

Mr. Nellis: You mean consignment dealers do that? How is that possible?

Mr. Rath: So we go out and try to sell him at the price which we want to sell the gasoline. If he refuses to go along, we nominate the price at which he insists.

Mr. Hosmer: Will you tell me what category of people you are talking about? The dealer-operated station?

Mr. Rath: Either.

Mr. Hosmer: You are also talking about the

leased stations who accept the gasoline on consignment and who are selling your gasoline at a price that they, themselves, determine?

Mr. Rath: Let us put it this way: We go out and talk to them——

Mr. Hosmer: This is your gasoline on consignment, isn't it?

Mr. Rath: That's right.

Mr. Hosmer: You own it until the moment it is sold. What this fellow does at the station is act as an agent for you, right?

Mr. Rath: That's right.

Mr. Hosmer: Yet you don't control the price at which he sells?

Mr. Rath: We go out to him, and there are many cases—I could take you out right now and take you to some—where we say that we feel the price, say, on our premium gasoline, should be—I am just plucking a figure out of the air—should be 34.2, and he elects to sell at 34.9. Now, we——

Mr. Hosmer: But he elects to sell, and you don't have anything to do with it, even though he is selling your gasoline?

Mr. Rath: Let's say—you are going to point out that under the consignment agreement we are to nominate the prices, but I want to give a practical example.

Mr. Roosevelt: Let us read it into the record. The agreement says, "He will sell consignor's gasolines at prices from time to time specifically authorized by consignor in writing."

You say it in writing, don't you?

Mr. Rath: Could you let me explain exactly what takes place?

Mr. Roosevelt: Yes.

Mr. Hosmer: You are explaining a variance from the terms of the written contract now?

Mr. Rath: No. I could read a section of the contract that also states—and remember, suppose he elected not to sell at those prices. All we could do is cancel the consignment agreement, isn't that right? What other recourse have we? And then he goes into purchase and sale.

Mr. Hosmer: Wait a minute.

Mr. Rath: He gets his minimum guaranty of 6.6, 7.1.

Mr. Hosmer: Then he is not free to sell at any price he wants without something happening from the company end, is that right?

Mr. Rath: Let me explain why he really is free.

Mr. Hosmer: He can go into another arrangement, is that it?

Mr. Rath: Let me finish. Suppose on the basis of our normal pricing practice we would set our 7600, which is our regular grade, at a specific price, and we normally take a 4½-cent spread between it and our oil 76. We have cases where the dealer sets that 7600 price at the price we have nominated and spelled out in a written letter to him.

However, instead of taking a 4½-cent margin, he might elect to take a 5½-cent margin. Now, that consignment agreement provides that while he is responsible to us for all the moneys collected on gasolines, he is responsible only to the extent of the

difference between—one is a depressed price—between the normal retail price and the truck and trailer price to him, so in effect he pockets that difference. So he might then get an extra cent on Royal 76 and get his 6.6 on the house brand.

Mr. Roosevelt: All right. However, if he is not selling the gallonage that you think he should under that arrangement, you have the complete right under this contract to cancel him because he is not fulfilling the agreement in this paragraph 2.

Mr. Rath: You see, this doesn't cancel his lease at all. Our only recourse, Mr. Roosevelt, is to say, "All right, you are no longer on consignment." So he is on purchase and sale. He still gets a 6.6, 7.1 guaranty.

Mr. Roosevelt: Wait a minute. Let counsel ask a question, and then I want to come back to it.

Mr. Nellis: Mr. Rath, you have been going so fast that you have skipped some important points, I think, No. 1, your consignment dealer is virtually an employee of the company, isn't he?

Mr. Rath: Oh, no, Mr. Nellis.

Mr. Nellis: Let us find out if he is.

He will handle, advertise for sale and sell all gasolines delivered hereunder under the consignors' brands, trade-marks, and names.

He will sell your gasolines at prices which you specifically authorize in writing.

He will, at his sole expense, furnish, maintain and operate all facilities and equipment.

He will be exclusively liable for the payment of any and all withholding taxes or income, and any

and all withholding taxes or income, and any and all premiums, contributions——

and so on.

He will pay for all expenses, costs, and licenses. He will be responsible to you for all gasolines consigned to him. He will keep accurate records. He gets paid only on the basis of the agreement made here, which is that you will pay him upon a 30-day demonstration of what he sold under the consignment agreement.

You can't tell me that legally this is not an agreement for agency by which this man is your agent, virtually your employee.

(The lease referred to is as follows:)

Retail Dealer Consignment Agreement

This agreement made as of this .... day of ...., 19.., between Union Oil Company of California, a corporation, Consignor, and ....., Consignee,

Witnesseth:

First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasolines as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at ..... on the terms and conditions hereinafter set forth.

Second: Consignee agrees that:

1. He will handle, advertise for sale and sell all gasolines delivered hereunder under Consignor's

brands, trade-marks and names without adulteration and will maintain said brands, trade-marks and names on pumps and other facilities through which said gasolines are dispensed.

2. He will sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing.

3. He will, at his sole expense, furnish, maintain and operate all facilities and equipment and hire and pay the wages of all assistants he deems necessary or desirable for the operation of his business and they shall be under his sole direction and control and he shall be solely responsible for their acts and omissions.

4. He will be exclusively liable for the payment of any and all withholding taxes on income, and any and all premiums, contributions and taxes, for workmen's compensation insurance, unemployment insurance, old age benefits, pensions, annuities and retirement benefit insurance, now or hereafter imposed by or pursuant to any federal or state law or regulation, which are measured by the wages, salaries or other remuneration paid by Consignee to persons employed in connection with the storage or sale of gasoline hereunder, whether or not Consignee's employees, together with any interest and penalty, or either thereon. He will indemnify and hold Consignor harmless from any liability for any such payments and he will reimburse Consignor for any such payments made by it.

In the event that any ruling, order or decision of an administrative agency or of a court holds that Consignee or a person in a relationship similar to Consignee's hereunder, is an employee for the purpose of federal or state unemployment insurance, old age benefit insurance or income tax withholding, he authorizes and will permit Consignor to deduct and withhold from his commissions payable hereunder, all sums necessary for payment of any and all withholding taxes on income and any and all unemployment and old age benefit insurance premiums, contributions and taxes, federal or state, that are measured by such commissions, or by the aforesaid wages, salaries or other remuneration paid by Consignee; and he will reimburse Consignor for any payment by it of such premiums, contributions and taxes for which there has been no such previous deduction and withholding.

He will also indemnify and hold Consignor harmless from liability, claims or demands arising from death or injury to persons, whether or not Consignee's employees, or from damage to property occurring in connection with the conduct of his business and will maintain adequate insurance against such liability.

5. He will pay for all expenses, costs, licenses, and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business, excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and

delivery of gasolines hereunder and will promptly reimburse Consignor therefor in the event the same be paid by Consignor in the first instance. He will also conduct his operations in strict compliance with all laws, ordinances and regulations of governmental authority.

6. He will be responsible to Consignor for all gasolines consigned to him, or for loss thereof or damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion not caused by his negligence and will pay Consignor for all gasolines sold, lost or damaged as if said gasolines had been sold at Consignor's authorized retail prices then in effect, including applicable State and Federal taxes.

7. He will keep accurate records of all gasolines delivered hereunder, their disposition and price at which sold and will promptly account upon demand for all Consignor's monies and gasolines in his possession and pay Consignor for any shortage which may develop (except as provided in 6 above) at the then applicable authorized retail sale price and will not charge against funds or any property of Consignor for which he is accountable any monies due him from Consignor. Consignor will have the right at any reasonable time to check stock on hand and inspect and audit Consignee's records and accounts.

8. He will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and

transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds.

Third: Consignor agrees that:

1. It will consign and deliver to Consignee f. o. b. Consignee's place of business specified in Section First hereof, all gasolines to be delivered hereunder by such means as it may elect.

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's posted minimum retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof: Provided, however, That when Consignor's authorized retail price for the sale of the gasoline

hereunder in effect at the time and place of sale thereof is more than Consignor's posted minimum retail price for such gasoline in effect at the time and place of sale thereof, such commissions shall be increased by the full amount of the difference between such posted minimum retail price and such authorized retail price: Provided further, however, That in no event shall said Commissions be less than $.... for each gallon of 7600 Gasoline and $.... for each gallon of Royal 76 Gasoline.

3. It will pay the property taxes on all its gasolines in storage.

Fourth: Title to all gasolines consigned and delivered hereunder shall remain in Consignor until sold by Consignee as provided herein.

Fifth: The quantity of gasoline receipted for by Consignee shall be conclusive evidence of the quantity delivered and Consignee waives any claim against Consignor as to quantity, quality, commissions, credits, payment or settlement unless presented to Consignor in writing within ten (10) days after such delivery, sale, settlement or payment.

Sixth: All sales made by Consignee shall be for cash on delivery: Provided, however, That sales may be made upon credit to specified accounts or customers holding and presenting a valid and unexpired Union Oil Company of California national credit card or valid and unexpired credit card of companies from time to time specifically authorized in writing by Consignor, but only within the credit

limits and terms of sale as authorized by said credit cards. Consignor may revoke such authority at any time.

If credit sales are made either above the authorized credit limit or not in accordance with the authorized terms of sale, Consignee will account to Consignor therefor in cash on demand or Consignor may deduct this amount from any commissions, monies or anything of value in its possession belonging to or due Consignee.

Seventh: Consignor may, at its option, withhold commissions, monies or anything of value in its possession belonging to or due Consignee for the purpose of reimbursing itself for any indebtedness due from Consignee.

Eighth: This agreement will be for term commencing the .... day of ....., 19.., and ending the .... day of ....., 19.., and from year to year thereafter until cancelled by either party at the end of the initial term or of any subsequent contract year upon at least 30 days written notice to that effect. This agreement shall cease and terminate upon any termination of Consignee's right to occupy the premises described herein.

Ninth: In the event of any breach hereof, Consignor may revoke and terminate this agreement immediately and thereupon all consigned gasolines shall be returned to Consignor and all sums due shall be paid immediately.

Tenth: This agreement may not be assigned or transferred by Consignee without Consignor's written consent and may not be assigned by operation of law.

Eleventh: Deliveries hereunder shall be subject to interference or delay resulting from causes beyond Consignor's reasonable control.

Twelfth: This agreement shall terminate and supersede, as of the commencement date hereof, all prior agreements between the parties covering the sale and delivery of gasoline for resale at the place of business above specified. This agreement covers all the terms agreed upon by the parties and no employee or representative of Consignor has authority to change or modify its terms nor to make any statements, representations, promises or agreements not herein contained.

In Witness Whereof, the parties hereto have caused this agreement to be executed as of the day and year first above written.

UNION OIL COMPANY OF CALIFORNIA,

By .....,

Consignor.

By .....,

Consignee.

Mr. Rath: Mr. Nellis, can you tell me, outside of the fact that we elect to nominate the price if we so desire under consignment, and pay him a commission, where he is any less independent under that than he is under our lease deal, where he hasn't signed this?

Mr. Nellis: You just said the biggest "outside" of all time.

Mr. Rath: Pardon?

Mr. Nellis: You just said the biggest "outside" of all time. You said outside of the fact that you set the price and tell him what to do.

Mr. Rath: I could take you right now into Los Angeles——

Mr. Nellis: Wait a minute. Let me finish, if you will.

Mr. Rath: Could I finish, please?

Mr. Nellis: All right.

Mr. Rath: We have told you that we, in that document, exercise the right to set the price. I can take you into Los Angeles or other cities where they are under consignment, and there are varying prices because the dealer and our man have agreed, because he wanted to get more with premium or the house brand, and prove that he could, than our nominated price, to a higher nominated price, and he is getting a higher margin.

Mr. Nellis: Mr. Rath, the title to the gasoline remains in your hands.

Mr. Rath: Pardon?

Mr. Nellis: The title to the gasoline that this dealer has is in your hands. You set the price. Can

you sit there and tell me that he is independent? I don't understand that.

Mr. Rath: Do you consider all commission agents as not having any independence?

Mr. Roosevelt: Wait a minute. I think the committee will just decide on its own what it thinks in relation to the testimony. You have given us honest answers on it. It is a question, perhaps, of difference of opinion.

Mr. Hosmer: Mr. Chairman, I don't want the counsel's remark to be interpreted, that as far as I am concerned that this committee is unanimous in any respect that this man is or is not independent. He signs a contract at which he is going to get a fixed margin of profit on a gallon of gasoline. He voluntarily goes into it, and he submits to the ascertainment of the retail price by the company. He goes in with his eyes open, so I don't think that the committee should reflect any fixed opinion on that.

Mr. Roosevelt: The committee has made no determination of any kind.

Let us go on, however, and ask, if you cancel his consignee's contract, does he automatically get a sales and purchase contract?

Mr. Rath: We don't write sales and purchase contracts.

Mr. Roosevelt: Then he might be out of business.

Mr. Rath: No; he wouldn't be. He would still have a lease. This changes no—if he is a lease station, Mr. Roosevelt, this changes no conditions of

the lease per se other than the pricing and commission basis.

Mr. Roosevelt: Are you still required to deliver him the product?

Mr. Rath: Pardon?

Mr. Roosevelt: Are you still required to deliver him the product under the terms of the lease?

Mr. Rath: There is no exclusive arrangement on this. Our lessee could buy other products. There is nothing in our lease which stipulates that he must buy our gasoline and sell it.

Mr. Hosmer: No; but will you still sell him the product? That is the important thing.

Mr. Rath: Oh, yes.

Mr. Hosmer: You are not consigning it. Now will you sell it to him at the tank wagon price?

Mr. Rath: We have had a dealer on consignment who said he didn't want to be on consignment, so we took him off, and a couple of months later he wanted to be back on, and we put him back on.

Mr. Hosmer: Do you have a right to sell him gasoline on the tank wagon priee?

Mr. Rath: Is this in the event you say he cancels his consignment agreement? Surely.

Mr. Hosmer: Is he out in the cold, or does he actually have an actual right to buy gasoline from you and stay in business?

Mr. Rath: He does. We have drawn up a service-station lease with a dealer that is going to be effective for a year. There is no purchase and sale agreement connected with it. It is not an exclusive dealing contract. He doesn't have to buy our gasoline,

although he has leased that station for a year. Then, alongside of that, if he agrees to do it, we put him on consignment, completely separate document, that obviates none of the terms of the original lease. It is simply to handle the purchase and sale of gasoline on a different basis, put it on a commission basis. If he goes off consignment, there is no relationship at all to his contractual status with us on a lease document. On a purchase and sale he is a dealer who simply says, "I don't want to be on consignment, I am canceling," and we say fine and keep selling him the gasoline.

Mr. Roosevelt: Do you have any lessees who sell anybody else's product?

Mr. Rath: No; we don't, Mr. Roosevelt. They are paying us rental, so I assume that is one of the reasons they want to handle our products. We advertise that. We think we ought to sell them on the fact that our products are the best, and so far we have been successful in doing it.

Mr. Roosevelt: Are there any cases in the company's file where you have refused to sell a lessee, and he has been unable to pay you rent and you have canceled the lease on the ground of nonperformance?

Mr. Rath: Nonperformance due to nonpayment of rent?

Mr. Roosevelt: Nonperformance because he hasn't paid you the agreed-upon rent.

Mr. Rath: Not that I can recall. If he is bankrupt and can't pay for his gasoline—you see, we collect rent at the time we make the gasoline delivery. Now, if he can't pay for the gasoline delivery,

he is automatically in default in rent, but quite often we will make credit arrangements or credit terms with him so that he can make it up, but our policy certainly would not be that because he couldn't make payment of a delivery that we automatically cancel the lease. He doesn't even have to—all he has to do is pay the rent, let's say, and he continues in that station for the term of his lease.

Mr. Roosevelt: I understand the answer to the question to be that he always can get his supply from you if he wants it.

Mr. Rath: Yes. The consignment agreement has no relationship to his basic lease, as I say, other than those two points of purchase and sale.

Mr. Roosevelt: But if he is on purchase and sale arrangement, he can still get his supply from you if he wants to.

Mr. Rath: Or go back on consignment if he elects to do so.

Mr. Roosevelt: All right.

Mr. Rath: I would like to read a statement. I know this matter of consigned gasoline is of quite a bit of interest to you, and as you know, we are one of the leaders out here on the west coast on it, so for the record I would like to read some thoughts I put down on it that explain our thinking.

Consignment is our method of protecting our dealers' profit margins during disturbed retail price conditions, at the same time maintaining our dealers' positions as people handling a premium quality product. We have not used consignment as a means of unfair competition, nor has it been used to price

any dealer out of any station. It has instead been used by us to maintain a competitive relationship between our dealers' prices and those of our competitors.

We are proud of our retail consignment program which has accomplished the ends outlined above. We have been able to make these accomplishments without taking away any of the independence of our dealers. Through our consignment program we have established and maintained under all conditions the minimum guaranteed margins for our dealers that are the best in the industry. It has brought our dealers one other substantial benefit also—and I would like to point this out strongly—they have available for other uses the investment which otherwise would be in gasoline inventories. This amounts to an average of $2,500 per dealer.

If there is any suspicion or resentment by any dealers or dealer groups, it certainly appears that Union Oil Co.'s retail consignment program is a greatly misunderstood one. It does not remove any aspect of a dealer's independence other than giving us the right to name the dealer's selling prices. It has not been used to create or disturb any retail price situations and instead has, as a matter of fact, contributed materially to the economic welfare of our dealers.

If we were today to withdraw the consignment program as it is now set up, we know that such action would be bitterly opposed by our dealers. Any problems that are laid at its doorstep—and there were some problems as there are in any new pro-

gram—have been corrected to the point that a survey of our dealers today would reveal that the great majority of them are heartily in favor of consignment. We are able to offer the names of hundreds of our dealers who are in favor of the program.

Mr. Roosevelt: Mr. Rath, if we may move on because we have a great many other people to hear from, I think you can skip the paragraph that deals with the legislation. The committee will understand your general opposition is pretty much like the others.

Mr. Rath: That's right.

Mr. Roosevelt: I think if it is all right with you, we will just allow the rest of the statement to be read into the record because we do have 1 or 2 important questions which are not contained here that we would like to ask.

Mr. Rath: Surely.

(The statement of Mr. Rath in full is as follows:)

Statement of Union Oil Company of California Before Subcommittee No. 5 of the Select Committee on Small Business of the United States House of Representatives

April 23, 1957.

Gentlemen: My name is Robert Rath. I am sales manager—dealer sales for Union Oil Company of California.

This statement is made in response to the chairman's letter to us of March 29, 1957, which sets

forth certain specific areas of questions. Insofar as this statement covers information outside of my own responsibilities, it is based upon information supplied at my request which I believe to be accurate.

1. We are asked to submit all contracts which we may have with manufacturers of TBA products. We have no contractual arrangements with any such manufacturers.

Next we are asked what percentage of our overall business is represented by TBA. The company's revenue from TBA sales is less than 0.2 of 1 per cent of the company's total revenue.

2. We are asked to indicate what specific changes have been made in our leases, franchises, agreements, and arrangements with our dealers since 1955.

The rental clause in our service-station leases has been modified.

3. You ask for a list of our various types of dealer agreements and for specific information regarding company-operated stations and consignment agreements. Dealers in Union Oil products either buy gasoline or take it on consignment. Union has no purchase or sale agreement with those who purchase its gasolines. With those who handle its gasoline on consignment, Union has consignment agreements. Copies of Union's service-station lease form and retail consignment agreement have been submitted to this committee. In addition, there is sub-

mitted herewith a copy of Union's so-called paint agreement.

Consignee commissions are discussed later.

Union has only 20 employee-operated service stations. These are maintained for training and experimental purposes.

4. You asked us to submit a breakdown showing the different types of dealers in each State in which we operate. The following is such a breakdown:

	Employee operated	Retail consignees	Purchase and sale	Total
California	17	2,149	370	2,536
Oregon		410	140	550
Washington	2	436	296	734
Nevada		57	26	83
Arizona	1	134	70	205
Total	20	3,186	902	4,108

Of the foregoing, the following operated under leases from Union:

California	1,536
Oregon	239
Washington	337
Nevada	36
Arizona	113
Total	2,261

You ask for figures as to whether company-owned or commission stations are self-sustaining, or subsidized from other profitable operations. Union's company-owned and commission stations are self-sustaining and are not subsidized from other operations.

5. You ask if we buy and sell TBA items to dealers as distinguished from No. 1, and indicate percentage of dealers handling noncompany TBA items. Union does not buy and sell TBA items to dealers.

6. You ask that we state our policy in regard to market prices at the retail level. Our policy is to maintain competitive prices. In this connection, Union's Royal 76 customarily commands a premium of an extra cent per gallon.

You ask what level of margin to the dealer we consider necessary to maintain in price-war cases. In the case of dealers taking delivery by truck and trailer our policy is to maintain a margin or commission of 6.6 cents and 7.1 cents, respectively, on our grades of gasoline. In cases of price wars, we do make price concessions to a purchase and sale account. No price concession is necessary in the case of consignment.

7. You request our views as to the bills introduced by your chairman on January 3, and to express our opinions, if any, as to any aspects of the relationship between us and our dealers that can be improved by other proposed remedies, whether legislative or nonlegislative. In this connection, we are asked to indicate our belief as to the effects on consumers and retailers of "divorcement" and "TBA divorcement," as well as such effects upon our own company. It is our belief that any problems that may exist in the dealer-supplier relationship can be resolved without legislative regulation. In January

of this year we instituted a policy of formal conferences between our management and dealers. We are holding approximately 90 of these each month, during which each dealer has an opportunity to express himself freely. We believe that through these meetings a means is provided by which mutual problems can be made known and solutions sought. Admittedly, this program is still in its infancy, but it is believed that as it develops it will provide a means of eliminating points of difference which may from time to time arise between dealers and ourselves.

In addition, we conduct formal dealer-training schools, monthly merchandising meetings, individual on-the-job training service and merchandising for dealers and their employees, and in other ways endeavor to assist our dealers in the best economic conduct of their business.

We do not believe that the proposed bills will aid dealers, suppliers, or the public.

8. You ask how we regard competition at the retail level with our own retailers. As only 20 of our four-thousand-odd retail outlets are company operated, it is obvious that they are not intended to be in competition with our own retailers. You ask do our lessees lead or follow the market, by which we presume you mean "do our dealers lead or follow the market."

Union does not regard itself as either a market leader or market follower. It does endeavor, so far as competitive conditions permit, to market its prod-

ucts at prices which it believes offer a fair return to it and to those who handle them.

9. You ask us to state the number of retail-dealer failures, lease cancellations and terminations for the years 1955 and 1956 and the first quarter of 1957.

The figures for 1955 are not yet available and will be submitted later if desired.

During the year 1956 there were approximately 206 mutual cancellations caused by the dealer's financial difficulties. During the first quarter of 1957 there were 59 such cancellations.

During the year 1956 there were 559 and during the first quarter of 1957, 140 mutual cancellations for other than financial difficulties. The reasons for such mutual cancellations in the order of their frequency of occurrence were: Other business preferences; leased another station, either with Union or competitive; ill health; termination of Union's lease from station owner; death or moved from area; domestic difficulties; partnership dissolution.

During the year 1956 there were 10 lessees whose leases were not renewed.

During the first quarter of 1957 there were 3 lessees whose leases were not renewed.

10. You ask what our company is doing about obtaining locations along new superhighway routes. Our representatives are studying proposed highway routes, so that in proper time we may bid for locations along such routes.

11. You ask that when the price of crude oil was increased in January 1957, if our company put into effect a 1-cent-per-gallon increase and, if so, has this increase been sustained at the retail level? At that time Union increased its tank wagon and normal retail prices by $0.005 per gallon. On the whole, the increase has been sustained at the retail level.

12. You ask if our company offers for sale any automotive equipment not in the TBA line. Union does not offer for sale any automotive equipment or TBA equipment.

13. Union belongs to the following jobbers and retail trade associations:

(a)	Spokane Retail Trade Bureau, Spokane, Wash., contribution during 1956	$ 18
(b)	Pacific Northwest Trade Association, Seattle, Wash., contribution during 1956	100
(c)	Oil Heat Institute, Seattle, Wash., and Portland, Oreg., contribution during 1956	3,300

14. Union is a defendant in a pending antitrust action. The name of the case is "United States of America v. Standard Oil Company of California, et al.," civil action No. 11584—C, in the District Court of the United States for the Southern District of California, Central Division.

Mr. Rath: Have I answered all your questions on consignment as completely as you want?

Mr. Roosevelt: Well, I wouldn't quite say that, but——

Mr. Rath: I have tried.

Mr. Roosevelt: I know you have tried.

Let me first ask you, you operate your own refineries, I judge?

Mr. Rath: Yes; we do.

Mr. Roosevelt: Do you sell from those refineries to any unbranded or rebrand dealers?

Mr. Rath: Yes. Our confidential schedule shows the names of those companies, the refineries, and the jobbers.

Mr. Roosevelt. It would not be out of order to say that it was a substantial portion of your total sales.

Mr. Rath: We list 2 years there. In 1956 it ran 18½ per cent of our total. In 1957, in the first quarter, it was 6 per cent of our total gasoline.

Mr. Hosmer: May I ask, those sales to refiners, do you know whether that in turn goes to retailers or goes into Government contract commitments or export or what?

Mr. Rath: We have no way of knowing how much of that gasoline goes to commercial accounts, farmers, retailers, or Government.

Mr. Roosevelt: In other words, they are the wholesale for resale again, aren't they? You sell to the——

Mr. Rath: We sell to refiners and jobbers and they in turn would have distributors, I presume, who would in turn furnish commercial accounts, farms, possibly, or retailers.

Mr. Roosevelt: You also sell to union brand named nonlessee dealers. I think we understand that situation. I will eliminate that question.

As to these people to whom you sell, these non-

brand or rebrand people, do you sell to them on an exclusive basis?

Mr. Rath: You mean do we have any one of these on an exclusive basis?

Mr. Roosevelt: Yes.

Mr. Rath: Not that I know of, Mr. Roosevelt. I don't handle the sales—it is called refinery and jobber sales. I don't handle it directly. My understanding of it is that they are principally spot sales, not long-term contracts, and no exclusive contracts.

Mr. Roosevelt: Is there any difference in the quality of the gas that you sell to them, that you sell through your own brand stations, company stations, consignees, or others?

Mr. Rath: Yes, yes. No one, to my knowledge, in the past 10 years has ever received our oil 76, our premium grade, on any such arrangement. In 1956 about 35 per cent of our sales of the 18½ per cent were our regular grade, but in 1957 only 5 per cent of them have been—5 per cent of our 6 per cent. In other words, 6 per cent of our total motor gas sales this year went to the refiners and jobbers and of that 6 per cent only 5 per cent was our regular grade of house brand. That is about 0.3 of 1 per cent.

Mr. Hosmer: The difference in grade, is that due to the additives? And by that I mean was the basic gasoline the same, or was it different octane gas and so forth down the line?

Mr. Rath: The specifications were completely different. In other words, we could talk vapor pres-

sure and talk warmup index and other specifications such as research and——

Mr. Hosmer: Mr. Thompson told us this morning his company had an awful time trying to run the refineries to get any separation in there. Do you have two different refineries you can use or why could you people do it and they can't?

Mr. Rath: Well, you see, you take a number of, you might call them, raw gasoline stocks, to blend off your finishing stock, so if you have sufficient storage for both the raw gasolines and sufficient storage for the end products, you can work up blends of whatever specs you want.

Mr. Hosmer: In other words, the difference is in the blending and not in the refining process itself. Other than that you refine the very——

Mr. Rath: You can take a straight cut, too. Basically it is blending. I would say that is basically it. I don't know if you understand refining techniques—I certainly don't—but you do make a bunch of different blending stocks, and then you can blend up whatever specs you want.

Mr. Roosevelt: Mr. Steed, did you have a question?

Mr. Steed: No.

Mr. Roosevelt: Mr. Nellis, I believe you have a specific complaint which I think will illustrate, perhaps, some of the questions the committee has in mind. May we run through the specific complaint which is an actual case in point?

Mr. Nellis: I want to say, Mr. Chairman, that the committee has investigated this matter and has

the documentary material to substantiate the complaint.

But before I do that, I would like to ask you a question, Mr. Rath, very briefly. Would it be possible for any Union Oil consignee to refuse to let you set the retail price and then have the consignee agreement canceled without having his ground lease canceled at the same time?

Mr. Rath: Certainly.

Mr. Nellis: It would be?

Mr. Rath: Yes.

Mr. Nellis: How would that be possible?

Mr. Rath: Well, there is no connection between the two. You have both our lease, and you have a consignment agreement, and cancellation of the consignment agreement would have no bearing on the other.

Mr. Nellis: Let me ask you this very briefly because I just want to get it straight in my mind. If the consignment agreement is canceled and he doesn't immediately sign it on a new basis as a dealer and say a week or period of 2 weeks elapses, can he just sit there without cancellation of the ground lease?

Mr. Rath: Oh, surely. I don't know of any case——

Mr. Nellis: It was my understanding sales purchases are not written agreements anyhow.

Mr. Rath: This is just the commission document whereby if he likes to go on a consignment basis, we elect to pay him a commission for the sale of that, and it has no connection. As I say, we draw the

same document up, Mr. Nellis. I think I should illustrate it. The same consignment document is used for a dealer who owns his own grounds and his own facilities as is used for our leased account, where we own the complete facilities, so you can see there is no connection between the two.

Mr. Nellis: I wanted to get that straight on the record.

Now, I want to tell you very briefly about a case that the committee has investigated, and I am going to read you the man's own statement.

I have been a Union Oil dealer for the past 22 years and own my own service station. I feel that I owe it to the rest of the Union Oil dealers on the Pacific Coast to speak up for them, too. They don't dare speak their minds or even attend the union of service station meetings for fear of losing their dealerships within 30 days. For the past year they——

referring to you——

have had another scheme. Its sole purpose is to beat the antitrust violations and also cheat dealers out of their temperature allowances.

What is a temperature allowance, do you know?

Mr. Rath: Yes. That is one of the points I have made where we have made where we have had some growing pains with consignment. Union Oil is one of the companies on the West Coast who have corrected deliveries that are in excess of 5,000 gallons, that are full truck and trailer, down to 60°. We might deliver the gasoline at 70°, and say it is a

load of 6,000 gallons, and we charge for 5,950 gallons, reducing to 60°. Now, that has been our practice customarily over a long period of time. On consignment we then reached the point where we were making deliveries from one of our tanks to another, you might say, well, our tanks. In other words, that product remained ours. Now, in our normal accounting procedure no correction is made when we transfer gasoline.

I want to point out, before you go any further, that has been one of the items in these dealer conferences—and I have talked to 600 dealers in the last 2 months—that was of quite some concern to them, and I issued instructions April 1 restoring temperature adjustments, so it is a thing of the past, the problem, and it resulted from the fact that they were sincerely concerned. I told them I wanted to wait until I went to the Northwest, because it works the other way there. You deliver at 45° and correct up to 60°, but in the Northwest they said it was no problem, they balanced off.

Mr. Nellis: All I can say in response to that is that this statement is dated April 10, and we have a further statement from this man on April 19, and this is what he says. This is some 19 days after your change.

Mr. Rath: He is misinformed. I issued the instructions, and I am sure he is getting a temperature correction, Mr. Nellis.

Mr. Nellis (reading):

The company persuaded most dealers that did not have large enough storage (including myself), to

spend $1,700 for larger storage tanks so that we could get the maximum margin and temperature allowance on 5,000 gallons or more purchase. When the company started the consignment agreement in December, 1955, they told us that we would pay for the gasoline once a week by pump meters and in that way they would be standing the shrinkage. Three months later they changed the method of payment to the amount delivered by the tank truck and stopped our temperature allowance. The agreement was for 1 year. On December 21, 1956, I canceled my consignment agreement and demanded my temperature allowance back and the right to own the gasoline in my tanks.

For 3 weeks they tried to talk me into staying on consignment—telling me that I would have to pay 1.6 cents more for the regular gasoline than the other dealers who were still on consignment. I bought the gasoline back and paid them 1.6 cents more for the regular gasoline than I had been paying. Then I told them that I was going to change to another company. The salesman called the sales manager, and he told us that the company would refund us the 1.6 cents at the end of each month. That was 3 months ago—and we haven't received a refund yet.

I am going to give you the name of this dealer, Mr. John Thomas Brock, who has been with your company now for 22 years, 432 East Ninth Street.

(The letter referred to is as follows:)

April 10, 1957.

Hon. James Roosevelt,
House of Representatives,
Washington, D. C.

Dear Mr. Roosevelt:

I am writing you for your permission to appear before your investigating committee in regards to price discrimination and antitrust violations by the Union Oil Company of California.

I have been a Union Oil dealer for the past 22 years and own my own service station. Therefore, they cannot pressure me or scare me out of giving you the facts. I feel that I owe it to the rest of the Union Oil dealers on the Pacific coast to speak up for them, too. They don't dare speak their minds or even attend a service station association meeting (union of service stations), for fear of losing their dealerships within 30 days.

Since early 1953 when the gasoline war started here in Los Angeles, the Union Oil Co. has deliberately robbed its own dealers with such schemes as the incentive plan, for which I have proof.

For the past year they have had another scheme. Its sole purpose is to beat the antitrust violations and also cheat the dealers out of their temperature allowances. It is called the consignment agreement.

The company persuaded most dealers that did not have large enough storage (including myself), to spend $1,700 for larger storage tanks so that we

could get the maximum margin and temperature allowance on 5,000 gallons or more purchase. When the company started the consignment agreement in December, 1955, they told us that we would pay for the gasoline once a week by pump meters and, in that way, they would be standing the shrinkage. Three months later they changed the method of payment to the amount delivered by the tank truck and stopped our temperature allowance. The agreement was for 1 year. On December 21, 1956, I canceled my consignment agreement and demanded my temperature allowance back and the right to own the gasoline in my tanks.

For 3 weeks they tried to talk me into staying on consignment—telling me that I would have to pay 1.6 cents more for the regular gasoline than the other dealers who were still on consignment. I bought the gasoline back and paid them 1.6 cents more for the regular gasoline than I had been paying. Then I told them that I was going to change to another company. The salesman called the sales manager and he told us that the company would refund us the 1.6 cents at the end of each month. That was 3 months ago—and we haven't received a refund yet.

I told them last week that I was going to take it up with the Government, and that it is about time for a law to be enacted putting oil companies under utility control. Also, one to make service stations pay income tax on the full margin of profit received from their suppliers. This would end all gasoline price wars as quickly as the atom bomb ended the

war with Japan. This would bring an immediate improvement to the economy of the whole Nation.

I will be glad to fly to Washington immediately, should you need me.

Sincerely yours,

TOM BROCK.

April 19, 1957.

Notes on John Thomas Brock, Union Oil Co. dealer, 432 East Ninth Street, Los Angeles, Calif.

Re proposed testimony (conference with PCM today)

Mr. Brock's testimony will cover the following points and will indicate malpractices on the part of the Union Oil Co. in connection with their dealers, including others as well as Mr. Brock:

1. Retail dealer consignment agreement

Company owns gas in our tanks and pay us a commission. Stopped temperature control: $4,600 loss a year to Brock. At end of year (expiration date) Brock canceled this consignment agreement with due notice and bought gasoline in the tank, paying cash. Necessary to buy 5,000 gallons at a time to get temperature control and one-half cent bigger margin.

Consignment agreement signed for 1-year periods assured him of a commission of $0.071 on "Royal 76" (ethyl) and $0.066 on "7600" (regular) gasoline.

Effect of Brock's cancellation of agreement: (1) Bought gas in tanks back (for $2,600). Union raised price.

2. Price discrimination

Union raised price of gasoline to 2 cents more than other dealers in surrounding area.

Mr. Brock will produce receipts indicating purchase of gasoline on April 12, 1957, by his station showing a price of 28.8 cents per gallon for high test and 24.6 cents per gallon for regular. On deliveries made to surrounding stations on same date he will show that high test was sold to other dealers at 26.8 cents per gallon on high test, and 22.3 cents per gallon on regular.

3. Price war

A price war was then initiated by Union Oil and their dealers were instructed to drop their prices to 33.9 from 35.9 and to 28.9 from 29.9. The nearest Union Oil Co. station, about 10 blocks away, was ordered to reduce their price as well as Mr. Brock but, because of the difference in the cost of the gasoline to him, the Union Co. station could lower its price and still operate with a margin, but Mr. Brock could not since he had little or no margin left.

4. Loss of customers

The Ziegler Produce Co., of Los Angeles, has been a customer of Mr. Brock for the past 20 years. The Union Oil Co. approached them and had them install

a 7,000-gallon tank at their farm, and make approximately 2 deliveries a year to them. Prior to the installation of this tank, Mr. Brock had sold to this customer.

At that time, Union had stopped Brock's temperature control but, as an inducement to Ziegler, he was granted this allowance reducing the price of his gasoline. They sold to Ziegler at the same wholesale price that Brock was getting.

5. Rental allowance

Mr. Brock advises that it appears to be a practice of Union Oil Co. to leave dealers' tanks as close to empty as possible at the end of the month since rates are based upon gallonage and if they fall below the gallonage of the same month of the year before, a special assessment is made against the dealer of 2 cents per gallon.

Mr. Brock will produce a statement for his station reflecting this charge and will testify that by protesting he managed to obtain a $120 refund 6 months later and that only by threat of dropping Union Oil gasoline and switching to another company.

He is also bringing in a friend who had two stations and had the same difficulty with Union.

PCM.

Mr. Rath: Could I get into that and explain? I just happened to talk to our territory manager this morning on it.

Mr. Nellis: Surely.

Mr. Rath: As I pointed out, on this purchase-and-sale arrangement, in the event there is a price war and we make adjustments below this normal retail price, we do make up, I think the illustration I gave was what, 1.3 cents a gallon. We don't do it or haven't been doing it, Mr. Nellis, on any regular basis. This fellow is justifiably disturbed, and I asked our people why hasn't he been reimbursed and didn't get an answer, so this morning I was called by the southwest territory manager, and he should have his check today. I don't know; they are going to make it up, but, in any event, this is simply a clerical oversight. It shouldn't have happened. He is not going to make 0.6 cent less by not being on consignment or being on consignment.

Mr. Nellis: This matter was adjusted this morning, you say?

Mr. Rath: I told them to.

Mr. Roosevelt: That is the fastest action the committee has ever had.

Mr. Rath: Well, I think some of the others pointed out that we do have people who overlook these things. It is like the temperature adjustment. At the time we went on into this consignment, I am afraid we hadn't thought it all the way through on that particular score, and when we found out it was a legitimate item that disturbed the dealers, we corrected it. The meter readings, Mr. Nellis, we initially set up that our men read the meters weekly, in order to determine the sales and make the collection for the amount sold. We found that that was too awkward, and we went on a replacement basis.

We now deliver, say, 12,000 gallons into the tank, which remains our gasoline. When we deliver 6,000 gallons that have been sold, the next time, then, he pays for that 6. That puts him on exactly the same basis he was under what we used to call the one-delivery basis, which is what we used to use as a line of credit.

Mr. Hosmer: Then you agree he still had a right to be mad at you; is that right?

Mr. Rath: Yes; that is right. We are certainly going to apologize to him, because there is no question in our minds that we owe him that money. We told him he would get it, and I want to say I regret the delay. There shouldn't have been a delay.

Mr. Roosevelt: Mr. Rath, I think, in fairness to you, I ought to say there will be other complainants coming before the committee concerning Union Oil, I hope you will stick around and give them the same service. [Laughter.]

Mr. Rath: I think in other cases I will have to hear it first. I won't be able to anticipate.

Mr. Roosevelt: As long as you give it the same consideration, that is all the committee has a right to ask, of course. I would like to just ask—you have been very patient, and I think we will excuse you—what is the reason for the drop from a fairly large amount, let's say around in excess of 15 per cent that was going to the rebrand dealers or wholesalers, to below 8 per cent?

Mr. Rath: Prices are too high. They don't want to buy from us.

Mr. Roosevelt: Your prices are today too high. In other words, you don't really need to sell any gasoline today, so you put the price up. I presume you would lower it if you had to sell it; is that right?

Mr. Rath: I couldn't tell you that. I know we used to supply some product to Hancock, and we don't any more, and I asked the fellow who is in charge of direct sale, and he said, well, we raised our price, and they found another source at another price, so they left us, so I am presuming the drop is as a result of our prices being too high and their being able to find a supply at lower price.

Mr. Roosevelt: Would it be wrong for us to reach the conclusion that because you really don't need to sell to rebranders, you are selling your output today to your own dealers?

Mr. Rath: That is a logical assumption; to our dealers or possibly government sales, possibly offshore sales. In other words, the surpluses are what are sold to these people.

Mr. Roosevelt: Do you post these prices to the nonbrand dealers?

Mr. Rath: I don't know of any time we have ever had a refinery rack price as such.

Mr. Roosevelt: Is there any reason that you know of why that price should not be posted?

Mr. Rath: Well, yes, I think there is probably a good reason, because there is no fixed price in that—it is not the kind of a business where you have a tank-wagon price. It is not a stable market. It changes from day to day. There are 20 independent

refineries, for example, from which this fellow could make a purchase, if he wanted to buy the——

Mr. Roosevelt: In what area are these 20 refineries?

Mr. Rath: In the area we serve on the west coast.

Mr. Roosevelt: The 20 independent refineries on the west coast. Could we have a list of those?

Mr. Rath: I could submit a list, yes. There is one building in Tacoma right now. I saw it a few weeks ago, and I think they have been on the increase rather than on the decrease.

Mr. Roosevelt: These refineries buy crude from you, not——

Mr. Rath: We sell no crude to any of the independent refiners. We are a crude-short company, and we have to purchase crude ourselves in substantial amounts in order to keep our refineries busy.

Would you like me to read off the names of these independents or submit it later?

Mr. Roosevelt: If you will just submit it for the record.

(The information requested is as follows:)

Union Oil Company of California,

April 25, 1957.

Re Los Angeles hearings, April 24, 1957, answers to two questions asked by the subcommittee during testimony of R. H. Rath, sales manager, dealer sales, Union Oil Company of California.

Mr. James Roosevelt,

Chairman, Subcommittee No. 5, Select Committee on Small Business, House of Representatives of the United States, Courtroom of United States Court of Appeals, 16th Floor, Federal Building, Los Angeles, Calif.

Dear Sir: During the course of the testimony of the undersigned, R. H. Rath, sales manager, dealer sales, Union Oil Company of California, two questions were asked and I agreed to supply the answers by letter after inquiry.

Herewith are the questions and answers:

Question No. 1: What are the names and locations of the independent refineries in the Pacific coast marketing area?

Answer. The following list shows those independent refineries in California as far as known to the undersigned:

Name:	Refinery location
Bankline Oil Co.	Bakersfield
Caminol Co.	Hanford
Century Oil Co.	Signal Hill
(Calstate Refining Co.)	Long Beach
Douglas Oil Company of California	Bakersfield
Douglas Oil Company of California	Paramount
Edgington Oil Refineries, Inc.	Long Beach
Envoy Petroleum Co.	Do.
Fletcher Oil Co.	Wilmington
Golden Bear Oil Co.	Bakersfield
Hancock Oil Company of California	Signal Hill
Macmillan Petroleum Corp.	Long Beach
Mohawk Petroleum Corp.	Bakersfield

Newhall Refining Co.	Newhall
Palomar Oil & Refining Corp.	Bakersfield
Rothschild Oil Co.	Santa Fe Springs
Socal Oil & Refining Co.	Huntington Beach
Sunland Oil & Refining Co.	Bakersfield
Sunset International Petroleum Corp.	Torrance
Wilshire Oil Co., Inc.	Norwalk

In addition to the above list, the United States Refining Co. is currently building a refinery at Tacoma, Wash., which should be onstream in the very near future. We should also like to call attention to the attached news clipping outlining the Wilshire Oil Co.'s plans for a refinery in the Hawaiian Islands. There have also been recent press releases outlining plans by Cal-Mex Oil & Refining Co. for a $27 million refinery in the San Diego area.

Question No. 2: How does Union Oil Company of California distribute or merchandise wholesale deliveries of gasoline to unbranded refineries and jobbers outside Union's own distribution system? Is it by posted prices, negotiation, or what?

Answer: (a) Union makes deliveries of gasoline to unbranded refiners or jobbers outside of its own distribution system by:

1. Pipeline to customer's storage.

2. Pipeline to customer's tanker or barge.

3. Into customer's transport truck, into common-carrier trucks or tank car, f.o.b. Union's refinery and/or terminals.

(b) Prices for delivery under (a)—1 and 2—are established by negotiation for each delivery. Prices

for delivery under 3 are either negotiated on the basis of a discount off Union's posted price for 7600 gasoline or on the basis of a firm quotation for spot deliveries; if for continuing deliveries, provision is made for subsequent review as necessary.

We trust that the above sufficiently answers your questions.

Very truly yours,

R. H. RATH,
Sales Manager, Dealer Sales.

EPCA Acts to Help Firm Start Isle Refinery

The Territorial Economic Planning and Coordination Authority's industrial development advisory committee yesterday acted to make it easier for the Wilshire Oil Company of California to go ahead with a Hawaiian refinery.

This was done by the committee's approval of a grant up to $2,500 for a refinery feasibility study to whichever island asks for it.

Whatever money EPCA puts up for the study is to be matched by the island for which the study is to be made.

And the approval was phrased so the grant could be made to whichever island the oil company selects for a site.

Not Doubted

That the grant was tied in with Wilshire Oil's interest in setting up an island refinery, though not so expressly worded, wasn't in doubt.

Wilshire representatives had explored possible sites on several islands last October and it was recently reported that a Wilshire official was due to return April 29 to make a final decision on a site for the company's refinery.

Maui business executives have shown strong interest in having the refinery located at Maalaea, which they say is a natural site for it, despite opposition from residents in the area.

Ray M. Allen, EPCA chairman, told the Kihei Community Association recently that he had recommended Maui, especially the leeward site, for a refinery.

But whether Maui was slated to get the refinery—if Wilshire does go through with one—wasn't a sure thing yet.

There were indications that Wilshire was also strongly interested in a site on Oahu, on Campbell estate land in Ewa.

Mr. Roosevelt: How do you sell? Do you sell wholesale on consignee method or by direct negotiated purchase or how do you do it?

Mr. Rath: Is this to the refiner?

Mr. Roosevelt: To these refiners, nonbrand refiners and other wholesalers.

Mr. Rath: I have not been in that end of the business at all. I have been with the company about 22 years, but I have no reason to be exposed to that end of the business.

Mr. Roosevelt: Would you submit that question

to the proper person in the company and have a written answer submitted?

Mr. Rath: Would you repeat that, please?

Mr. Roosevelt: How do you distribute or merchandise your wholesale deliveries to unbranded or wholesale dealers outside of your own distribution system?

Mr. Rath: Surely. I will be very happy to do that.

Mr. Roosevelt: Thank you, Mr. Rath, very much, for your co-operation and for enlightening the committee.

Mr. Rath: We will be around, too.

Mr. Roosevelt: We would appreciate it if you would stay and hear the specific complaints when they come up, and if you have any statement you want to make or any information you want to give the committee, such as you gave us today, it would be very helpful.

Mr. Rath: We will be happy to.

Mr. Hauk: One other thing. We had a mixup on the number of copies. I was misinformed on it, Mr. Nellis, and I am sure that now we have given you 4 or 5 copies. I trust that is enough.

Receipt of copy acknowledged.

[Endorsed]: Filed March 31, 1959.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO SET PRETRIAL CONFERENCE

To: Defendant above named and its attorneys, Moses Lasky, Richard Haas, Brobeck, Phleger & Harrison:

Please Take Notice That on Monday, April 6, 1959, at 9:30 a.m., or as soon as counsel may be heard in the Master Calendar Department of the above-entitled Court, Seventh and Mission Streets, San Francisco, California, plaintiff will move the Court to order a Pretrial Conference for the purpose of complying with the order of Judge Lloyd H. Burke, dated January 7, 1959, in the above-entitled action.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 31, 1959.

[Title of District Court and Cause.]

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Defendant Union Oil Company of California responds to plaintiff's Second Request for Admissions as follows:

1. Defendant denies Request 1. Defendant admits that during the month of April, 1957, R. H. Rath was an employee of defendant, with the title of Sales Manager, Dealer Sales.

2. Defendant admits Requests 2, 3 and 4.

3. Defendant objects to Request 5 on the grounds that it is improper in that it does not call for the admission of any relevant matter of fact, or any matter of fact at all, but asks defendant to speculate and opine respecting what a third person would say at a future time in the hypothetical circumstance of being asked certain questions, which in the nature of things is unknowable.

4. Defendant denies Request 6.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

Duly verified.

NOTICE OF HEARING OBJECTIONS TO REQUEST 5 OF PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

To plaintiff and to his attorney, Maxwell Keith, Esq.:

Please Take Notice that on Thursday, April 30, 1959, at the pretrial conference now set for hearing,

defendant will bring on for hearing its objections to Request 5 of plaintiff's Second Request for Admissions.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

Certificate of service attached.

[Endorsed]: Filed April 14, 1959.

[Title of District Court and Cause.]

STATEMENT UNDER LOCAL RULE 16

Pursuant to Local Rule 16, defendant files the following statement in connection with the pretrial conference set for hearing before the Honorable Lloyd H. Burke on April 30, 1959.

(a) Agenda of Matters to Be Considered

Defendant proposes the following agenda for the pretrial conference:

1. The matters directed to be considered by the Court's order filed January 7, 1959, viz.:

> "the nature of evidence upon which he [plaintiff] will rely as proof of damage. Legal authorities in support of the theory regarding admissibility of such evidence."

2. Settlement of the issues in the cause.

3. Consideration of matters of which defendant requests admission.

4. Hearing on defendant's objection to request number 5 of plaintiff's Second Request for Admissions.

5. Hearing on Plaintiff's Motion for Production of Documents filed April 22, 1959; determination of the propriety of said motion, and determination of the issue or issues, if any, to which said motion is conceived to be relevant.

(b) List of Documents Proposed to Be Identified and Introduced by Defendant

At the present time, defendant does not know all the documents which it may wish to introduce in evidence. The documents which defendant presently proposes to introduce are the following:

1. Service Station Lease between plaintiff and defendant dated April 27, 1956, a copy of which is attached and marked Exhibit A to the affidavit of R. R. Pinochi filed herein on May 26, 1958.

2. Retail Dealer Consignment Agreement between plaintiff and defendant dated April 27, 1956, a copy of which is attached and marked Exhibit A (pages 1 and 2) to Answer of Defendant to the Amended Complaint filed herein on November 24, 1958.

3. Letter agreement between plaintiff and defendant dated September 20, 1956, a copy of which

is attached and marked Exhibit A (page 3) to Answer of Defendant to the Amended Complaint filed herein on November 24, 1958.

4. Service Station Lease between plaintiff and defendant dated April 9, 1957, a copy of which is attached and marked Exhibit D to the Affidavit of R. R. Pinochi filed herein on May 26, 1958.

5. Letter from defendant to plaintiff dated March 19, 1958, a copy of which is attached and marked Exhibit A to the Affidavit of J. E. Campbell filed herein on May 26, 1958.

6. Certified copy of the judgment of the Superior Court of the State of California in and for the County of Fresno, made and entered June 17, 1958, in an action between the parties hereto entitled Union Oil Company of California, Plaintiff, v. Richard S. Simpson, Defendant, and numbered 102,048 in the files of said court, attached and marked Exhibit B to Answer of Defendant to the Amended Complaint filed herein on November 24, 1958.

A copy of each of the foregoing documents has been furnished to counsel for plaintiff.

(c) List of Requests for Admissions

At the present time defendant does not know all the matters it may request plaintiff to admit. At the present time the only matters defendant requests plaintiff to admit are:

1. That the copies of the two Service Station Leases, items 1 and 4 of part (b) above, are true copies of the leases entered into between plaintiff and defendant, and that said leases are the only leases entered into between the parties.

2. That the copy of the Retail Dealer Consignment Agreement, item 2 of part (b) above, as modified by the letter agreement, item 3 of part (b) above, is a true copy of the consignment agreement between the parties, and that said agreement is the only consignment agreement entered into by the parties.

3. That on September 22, 1958, plaintiff Richard S. Simpson moved in the Superior Court of the State of California in and for the County of Fresno, upon the grounds of excusable neglect, surprise and want of jurisdiction, for an order setting aside the default, entry of default, and the default judgment a certified copy of which is item 6 of part (b) above, and that said motion was denied.

4. That the judgment of which item 6 of part (b) above is a certified copy is now final.

5. That when plaintiff alleges (Amended Complaint, para. 29) that he "was unable to fix the price of his gasoline during the period May, 1955 [sic], to March, 1958," he means only that defendant did not sell plaintiff gasoline but that plaintiff was a party to a consignment agreement with defendant under which he obtained defendant's branded gasolines from it as its agent and not as

a purchaser, and that he was obligated by the agreement, if lawful, to sell said gasoline owned by defendant at prices specified by defendant.

6. That when plaintiff alleges (Amended Complaint, para. 28) that he was "compelled to accept a one-year lease" and that he was "compelled to accept a consignment agreement" he means only that he wished to lease the service station premises located at 4010 E. Ventura Avenue, Fresno, California, and to sell defendant's products, and that defendant offered plaintiff the one-year lease and the consignment agreement and made no other proposal, and that plaintiff accepted the proposal made by defendant.

(d) List of Stipulations

At the present time defendant does not know all the matters which it may suggest that plaintiff stipulate to.

The parties have heretofore stipulated that from some date after May 23, 1958, plaintiff has been in business as a retail service station dealer in Fresno, California, leasing the premises which he occupies from General Petroleum Corporation and buying and reselling the products of said General Petroleum Corporation. Defendant suggests that the parties attempt to stipulate respecting the details of this new business of plaintiff.

(e) List of Issues

1. Did plaintiff have any legal right to require defendant to sell gasoline to him, or otherwise to

deal with him on terms or conditions desired by him; and, if so, what is the nature of the legal right?

2. Did plaintiff have a legal right to require defendant to lease a service station to him at all, or to lease such premises to him for a term desired by plaintiff but not by defendant, or to renew a lease upon its termination; and, if so, what is the nature of the legal right?

3. Did plaintiff have any legal right in defendant's real property after plaintiff's lease expired; and, if so, what is the nature of the legal right?

4. Is not plaintiff estopped by the judgment of the Superior Court from claiming that he had any right to possession of defendant's real property after his lease expired?

5. Does the question of the legality of the Retail Dealer Consignment Agreement formerly existing between the parties have any relevance in this case?

6. If the question is relevant, in what way was the Retail Dealer Consignment Agreement illegal?

7. Can plaintiff premise a claim for damages upon performance by him of a contract to which he was a party?

8. Does plaintiff contend that, in the operation of the service station in Fresno, he or defendant was engaged in interstate commerce, or that anything he or it did or failed to do at or relative to said service station had a substantial, or any, effect

upon interstate commerce; and, if so, what is plaintiff's contention?

9. Does plaintiff seriously contend that during the time that he was defendant's lessee defendant had a monopoly of any kind in Fresno, California, or anywhere; if so, what is the claim of monopolization, and upon what alleged facts is it based?

Dated: April 27, 1959.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant Union Oil Company of California.

Certificate of Service attached.

[Endorsed]: Filed April 27, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S PRETRIAL STATEMENT OF ISSUES

Among the issues involved in this action are the following:

1. Whether the retail dealer consignment program of the defendant is in or substantially affects interstate commerce.

2. Whether the retail dealer consignment program of the defendant is an illegal attempt to control retail prices on its face.

(a) Whether the retail dealer consignment agreements were forced on unwilling lessees.

3. Whether the defendant has unlawfully used a lease of one year duration.

4. Whether the defendant has used its one-year lease to compel lessees to purchase petroleum products exclusively from the defendant, to sign retail price fixing agreements and to foreclose the opportunity of its lessees to obtain compensation for "good will."

6. Whether the defendant has attempted to monopolize the retailing of petroleum products.

7. Whether the lease of the plaintiff was refused renewal because plaintiff did not adhere to the retail price fixing activities of the defendant.

8. The amount of damages suffered by:

(a) The lease termination;

(b) The inability of plaintiff to fix his own retail prices;

(c) Out of pocket losses on the forced turnover of the station to defendant.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S AGENDA FOR PRETRIAL CONFERENCE

Plaintiff proposes as the following Agenda for the first Pretrial Conference in the above-entitled action that the following orders be entered:

1. The defendants produce for inspection and reproduction the documents identified as Plaintiff's Exhibits 1, 2, 3, 4 and 6 during the deposition of Reese H. Taylor.

2. The defendants answer the following Plaintiff's Interrogatories: Nos. 3, 4, 8, 9a, b.

3. The defendants produce for inspection and reproduction the documents set forth in plaintiff's motion for the production of documents filed April 24, 1959.

4. A target trial date be set for three months after this Pretrial Conference.

5. A further Pretrial Conference be held one month prior to said date.

The nature of plaintiff's evidence as to damages has been set as a topic at said Pretrial Conference.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1959.

[Title of District Court and Cause.]

STATEMENT OF NATURE OF EVIDENCE RE DAMAGES AND SUPPORTING MEMORANDA

I. Nature of the Evidence

A. Plaintiff suffered extensive damage when his lease was wrongfully refused to be renewed because he refused to follow the direct retail price fixing activities of the defendant.

To show the extent of said damages, plaintiff expects to show:

(a) The financial records of plaintiff;

(b) Approximately 230 letters from customers of plaintiff to Union Oil Company protesting the proposed ouster of plaintiff, showing his large established loyal clientele and his loss of good will;

(c) The losses suffered by plaintiff from operating the service station during a period of heavy road construction;

(d) The policy of Union Oil Company to continually renew leases to service station operators who abided by the policies of Union Oil Company.

(e) The expert testimony of plaintiff and others establishing loss of present value of a going business with a developed profit; loss of good will occasioned upon the forced turn over of the station to defendant; loss of value of equipment and excess charges on the forced turn over.

(f) The records of the defendant with respect to the operation of the service station involved after the plaintiff left the premises, and the operation of one or more of its wholly owned service stations.

(g) The records of the defendant as to the gallongage of selected lessees who have been lessees of defendant for 3, 5, 10 and 15 years, in order to show the value of constant occupancy of a service station site.

B. The plaintiff suffered extensive damage by the forced fixing of his retail prices while a lessee of defendant.

To show the extent of said damages, plaintiff expects to show:

(a) Testimony of customers who did not purchase gasoline from plaintiff because his prices were too high;

(b) The expert testimony of plaintiff and possibly others as to what his prices would have been absent direct price fixing control and his losses therefor;

(c) Records of defendant as to wholesale prices charged to off brand suppliers and retailers in the Fresno area.

II. Points and Authorities

When a party engages in conduct in violation of the antitrust laws and pursuant to such activity interferes with the business prospects and income

of another, the latter has suffered damages remediable under Section 4 of the Clayton Act.

Both the issues of injury and the amount of damages suffered lies with the exclusive province of the finder of fact. In Story Parchment v. Paterson Paper Company, 282 U. S. 555, and Bigelow v. R.K.O., 327 U. S. 251, the Supreme Court has held that the issues of injury and amount of damages suffered are factual questions. In the Story Parchment case, there was a destruction of a going business caused by a conspiracy to monopolize which unreasonably lowered prices and as a consequence plaintiff was forced out of business. The plaintiff proved his damages by the use of two estimates. First, he showed what his sales might have been in a free market over what he did actually sell prior to his closing. Second, he estimated by the testimony of his treasurer, to what extent his property was diminished upon its abandonment. The jury entered judgment for plaintiff, and it was entered by the trial court. The judgment was reversed by the appellate court in 37 F. 2d 537. The appellate court had held that there was no showing that the prices of parchment would have been higher than they were absent the conspiracy, and further that the plaintiff would have failed anyway. But the Supreme Court stated:

> "But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury with-

out usurping the functions of that fact finding body. Whether the unlawful acts of respondent or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury 'to be determined as a fact in view of the circumstances of fact attending it.' Milwaukee, etc., Railway Co. v. Kellog, 94 U. S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment would draw an opposite conclusion from the facts."

In Bigelow v. R.K.O., 1946, 327 U. S. 251, the Supreme Court stated:

"In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs. In this we but followed a well-settled principle. See Hetzel v. Baltimore & Ohio R.R. Co., 169 U. S. 26, 38-9. The tortious acts had in each case precluded ascertainment of the amount of damages more precisely, by comparison of profits, prices and values affected

by the conspiracy, with what they would have been in its absence under freely competitive conditions. Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible."

The Ninth Circuit has recently held that the mere evidence of unlawful acts under the antitrust laws with a tendency to cause injury is in itself proof of injury. In Paradise Theatre Corp. v. Fox West Coast Theatre Corp., 9th Cir., 1958....F.2d....1958 Trade Cases No. 69, 139, the Court stated:

"The mere unlawful combination over a period of time to eliminate competition is proof of damage."

See also Flintkote Company v. Lysfjord, 9th Cir., 1957, 246 F. 2d 368, and Moore v. Standard Oil Company, et al., 9th Cir., 1957, 251 F. 2d 188.

That there is an injurious impact when unlawful conduct under the antitrust laws interferes with the free market pricing of the plaintiff is established in the Story Parchment case, supra. That there is an injurious impact when unlawful conduct under the antitrust laws interferes with the prospects and duration of business is established in the Story Parchment case, Flintkote and Moore. That there is an injurious impact when a supplier refuses to continue custom to the plaintiff because of his failure to abide by the price fixing activities of the

defendants is established in the following cases: Kiefer Stewart Co. v. Joseph E. Seagrams and Sons, 340 U. S. 211; Johnson v. J. Schlitz Brewing Co., 123 F. 2d 1016, affirming 33 F. Supp. 176 at 33 F. Supp. 180, the lower court stated:

> "Defendant next contends that plaintiff failed to prove a valid and enforcible contract between plaintiff and defendant. Here defendant again confuses the first cause of action under Sherman Act with a suit on a contract. Once an illegal conspiracy in violation of the Sherman Act is shown all the plaintiff need do is show his damages."

Connecticut Importing Co. v. Frankfort Distilleries, 2nd Cir., 1939, 101 F. 2d 79; Connecticut Importing Co. v. Continental D. Corp., 2nd Cir., 1942, 129 F. 2d 651. In these cases plaintiffs were distributors of defendants. Their supply contracts were cancelled by the defendants after unlawful demands to conform to established prices or from other illegal purposes.

It is accordingly clear that the cancellation or refusal to renew business relations with a dealer because of reasons made unlawful under the antitrust laws causes an injurious impact on the dealer remediable under Section 4 of the Clayton Act and he may approximate his damages by relevant data. Further, it is clear that the inability to price commodities on a free and open basis because of conduct which violates the antitrust laws causes injury to the relegated dealer.

Respectfully submitted,

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF MAXWELL KEITH RE PRETRIAL CONFERENCE

State of California,
City and County of San Francisco—ss.

Maxwell Keith, being duly sworn, deposes and says:

That he is an attorney licensed to practice before the above-entitled Court and is the attorney for Plaintiff in the above-entitled action;

That on January 14, 1959, he took the deposition of Reese H. Taylor, Chairman of the Board of Directors of the Defendant, Union Oil Company of California, and the prior President of said Defendant company;

That the deposition shows at page 72, line 15, to page 74, line 6:

"Q. (By Mr. Keith): Do you have any knowledge or information whether or not it was policy of Union Oil Company to terminate or refuse to re-

new the leases of service stati[illegible] dealers who did not follow the consignment price [illegible] gasoline as authorized by the Union Oil Compa[illegible]?

"Mr. Lasky: You mean ter[illegible]nating leases of the consignee?

Mr. Keith: Leases of servi[illegible]e station dealers who were consignees of the service[illegible]

Mr. Lasky: The question is, whether he knows?

Q. (By Mr. Keith): Yes.

A. Terminate?

Q. Terminate, or refuse to renew the leases of service station lessees who were consignee dealers of Union Oil Company?

A. Well, any of the—any consignee or lessee of the Union Oil Company who did not meet our requirements as to operation of the station, presumably his lease would not be extended.

Q. And if he did abide by the policy of the Union Oil Company, would his lease then be extended?

A. With—you mean all policies?

Q. Yes; all policies.

A. If in every way he was a satisfactory dealer, certainly I think his lease would be extended.

Q. It is the ordinary business policy of Union Oil Company to renew leases after the one-year period has elapsed, when a dealer has complied with all the requirements of Union Oil Company in running the station?

A. I would say that would be the general policy.

Q. Does the Union Oil Company have any policy against preventing a Union Oil Company dealer

who continually follows all the requirements of Union Oil Company, to continue at the lessor's service station site as long as he observed all the Union Company policies?

Mr. Lasky: I don't understand that question.

Q. (By Mr. Keith): What I'm trying to say, is this, Mr. Taylor: Any objection to a service station dealer staying on a piece of property as long as he continues to abide by all the requirement policies of Union Oil Company? You don't have any time limitations?

A. Including the terms of the lease, and so forth?

Q. Yes. A. No; that's right.

Q. No time limitation upon which a dealer will not obtain a lease renewal, such as a man could be in a station ten years or twenty years or twenty-five years, as long as he abides by the policies and determination——

A. Might be. We have had dealers been with us much longer than that."

/s/ MAXWELL KEITH.

Subscribed and sworn to before me this 23rd day of April, 1959.

[Seal] /s/ PHYLLIS KNORR,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires 1-6-61.

[Endorsed]: Filed April 29, 1959.

[Title of District Court and Cause.]

PRETRIAL STATEMENT FOR PRETRIAL RULING

Comes now the plaintiff, and pursuant to the pretrial conferences of April 30, 1959, and May 21, 1959, in this action, and without waiver of a demand for a trial by jury, and for the purposes of a pretrial disposition of certain issues of law involved in said action, submits the following statement:

Plaintiff in this action was a lessee of a leasehold interest of a service station site held by defendant Union Oil Company of California located at 4010 East Ventura Avenue, Fresno, California. He held two one-year leases from said defendant for the period May 23, 1956, to May 22, 1957, and from May 23, 1957, to May 22, 1958. Said leases are attached as Exhibits A and D in the Affidavit of R. R. Pinochi, Union Oil Company's Motion for Summary Judgment. These leases were form leases, except as to inserts in effect at approximately 2,260 service station sites in the states of California, Oregon, Washington, Nevada and Arizona during most of the period herein. Contemporaneous with the signing of the first lease plaintiff was requested by defendant to sign a Retail Dealer Consignment Agreement. A copy of said Retail Dealer Consignment Agreement is set forth as Exhibit A to the Answer of Defendant to the Amended Complaint. Except for inserts said agreement was in effect in

approximately 3,186 key and desirable outlets selling Union Oil Company gasolines for resale in the five western states of California, Oregon, Washington, Nevada and Arizona, during most of the period plaintiff was a lessee of said service station site.

Defendant Union Oil Company of California is a corporation organized under the laws of the State of California and is engaged in the drilling, production, importing of crude oil; in the operation of pipelines in the States of California and Montana; in the operation of refineries in the States of California, Montana, Washington and Delaware; in the wholesale distribution of petroleum products in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho and Nevada; in the selling of petroleum products to retailers located in said states; in the storage of petroleum products and automotive accessories in approximately 400 bulk plants located in said states; in the ownership and operation of gasoline transports in the eight western states named above; in the selling of gasoline at or to retailers in the eight western states above named.

Defendant has acquired possessory interests in service station sites in the eight western states above named and leases such sites to others; that most of the said service station sites are leased by defendant to independent operators.

Defendant is engaged in the retailing of petroleum products to the public either directly or

through the independent operators of service station sites located in the eight western states.

As of December 31, 1957, defendant's financial statements reflected the following:

Current Assets	$228,908,606
Total Working Capital, Properties and Other Assets	$605,434,553
Sales of Petroleum Products	$425,115,531
Refined Product Sales—barrels	60,404,000
Refined Product Sales—Dollars	$347,900,000
Net Earnings	$ 38,235,535

At the end of 1954 the defendant created a so-called Retailer Dealer Consignment Agreement. (JPS letter, 12/24/54, Pltf's Ex. 4.) It was to be used at said time:

> "when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level." (id)

The Retail Dealer Consignment Agreement from said time provided that the consignee "will sell Consignor's (Union Oil Company of California) gasolines at prices from time to time specifically authorized by Consignor in writing."

By April, 1957, virtually all dealers who held leases from the defendant were on a so-called Retailer Dealer Consignment program, as follows:

	Employee Operated	Retail Consignees	Purchase and sale	Total
California	17	2,149	370	2,536
Oregon	---	410	140	550
Washington	2	436	296	734
Nevada	---	57	26	83
Arizona	1	134	70	205
Total	20	3,186	902	4,108

Of the foregoing, the following operated under leases from Union Oil Company:

California	1,536
Oregon	239
Washington	337
Nevada	36
Arizona	113
Total	2,261

(a) "Employee operated" means service stations operated by the defendant. There were 20 of these.

(b) "Retail consignees" means dealers who have signed retail dealer consignment agreements. There were 2,261 Lessee dealers on consignment and 925 dealers who owned or controlled stations on consignment.

(c) "Purchase and Sale" means dealers who purchase defendant's gasolines for resale at stations bearing Union Oil Company insignia. There were 902 dealers not under consignment but none of them were lessees of defendant.

The consignment agreement program of defendant as to lessees was effectuated by the use of serv-

ice station leases of a term of one year which allow defendant to control the activities of dealers under lease or agreement with it. As to master lease dealers said agreements were effectuated by the use of Paint agreements.

The consignment agreement placed all ordinary risks and obligations of service station operation on the consignee. He remains responsible for the gasolines except as to natural damage not under his control.

The defendant at all times herein maintained a policy of allowing leases of its service station sites for a term of one year only, that in order for a service station dealer to obtain a lease from the defendant he was under an obligation to sign the Retail Dealer Consignment Agreement. Further, existing lessees of Union Oil Company could not obtain lease renewals from the defendant at the end of the one year term without signing a Retail Dealer Consignment Agreement. On October 17, 1956, R. Linden, Sales Manager, Union Oil Company, wrote to his field Division Managers as follows:

"Messrs: F. K. Cadwell, R. H. Rath, W. I. Martin, R. D. Davis.

"Retail Consignee

"Our attempt has been to strenuously solicit the change over from products contract to consignee agreements and this effort must be continued and

accelerated as we expect that in the near future we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business.

"In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two-party deal or 'other' and the only paper we will write is a one year consignment agreement."

In 1956 there were 765 cancellations of leases between defendant and prior lessees of defendant.

The defendant refused to allow plaintiff a renewal of his lease because he would not abide by the consignment prices fixed by defendant on his sales of gasolines to the public. This policy of tieing in the consignment agreement to lease terminations also effectuated an exclusive arrangement agreement for defendant's gasolines between defendant and approximately 2,260 service stations so that lessee consignees are in effect required to buy their gasoline supplies exclusively from defendant.

The documents and records of the defendant will show that the purpose of the defendant in creating, perpetuating and maintaining the Retail Dealer Consignment Agreement program was to control the prices at which the independent service station dealers of defendant could sell their gasolines to the public, and that this purpose was effectuated in

interstate commerce. Lessees under the one year lease of defendant are independent businessmen with control and responsibility over the premises and with ordinary business risks and obligations. Prior to or at the time of entry into the leased premises the dealer-lessee obligates himself to obtain necessary equipment and an inventory, all of which he pays himself. The defendant does not guarantee the dealer any profit in the operations of the stations. The dealer on lease from defendant cannot usually arrange a sale of equipment, inventory and good will to a successor of his own choosing.

On April 15, 1958, when a change in commission payment was to be effectuated from a guaranteed commission to a sliding scale commission, causing dealer absorption when prices were below normal, defendant's General Sales Manager, Dealer Sales, R. H. Rath, wrote to Division Managers explaining the change and in stating as to how the change was to be effectuated said as follows:

> "3. A thirty-day notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give him the special letter which will be effective as previously set forth herein."

The full letter is set forth in Plaintiff's First Request for Admissions herein.

The retail dealer consignment program operates in 20 cities where the defendant has service station sites which are operated as company operated stations.

The defendant continuously notifies the consignment dealer of the prices which he is authorized to sell gasolines to the public. Authorized prices are set forth in defendant's consigned gasoline delivery tickets upon delivery of the gasoline. The defendant requests its consignees to sign these delivery tickets. Defendant also sends out form notices stating as follows:

"Gentlemen:

"Referring to that certain Retail Dealer Consignment Agreement between us dated ..... and particularly to the Second Section, paragraph 2 thereof, please be advised that effective on (date) at (hour) you are authorized to sell Consignor's gasolines at the following tax included retail prices:

"Royal 76 Gasoline $..... per gallon
7600 Regular Gasoline $..... per gallon

"Consignor reserves the right to change said prices from time to time.

"Very truly yours,

"UNION OIL COMPANY OF AMERICA,

"By ....."

In fixing an authorized price the defendant has varied prices between cities, between blocks with a city, and between zones within a city.

The defendant's purpose in establishing and maintaining the retail dealer consignment program was to allow defendant control of the retail price of its purchasers gasolines so as to equal or exceed predominant major gasoline prices, (JPS 109, 2/28/58, E.A.M. 325, 4/15/58) not obtainable with independent pricing by dealers.

The defendant, pursuant to the Retail Dealer Consignment Agreement, would often temporarily lower the price of gasoline in a so-called depressed price area at one or more service station sites until the depressed price period was over, and then raise the retail price.

The defendant through its employees polices the retail prices of the dealers. A letter dated April 7, 1955, from R. Linden to F. K. Cadwell states as follows, in part:

> "We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Rep and the Sales Manager are carefully policing the establishment of a new nominated price for any service station

so that they know it conforms with our instructions as outlined above.

"R. LINDEN."

The defendant has supplied large quantities of its gasolines to so-called unbranded refineries or jobbers. See defendants Answer to Plaintiff's Second Request for Admissions. The gasolines sold to these jobbers are in competition with the gasolines distributed to retail dealer consignees but is not labeled as Union gasoline. Defendant has not attempted to control the retail price at which the unbranded jobber or refinery sells the defendant's gasolines.

There will be proof that the plaintiff was directly injured by the perpetuation and effectuation of the Retailer Dealer Consignment Agreement program of the defendant. He obtained a desirable lease from defendant in May of 1956, but on condition that he sign the Retail Dealer Consignment Agreement. At the expiration of the one year lease, plaintiff protested signing the Retail Dealer Consignment Agreement and wanted a straight lease but was told in effect that he could not obtain a renewal of his lease unless he would abide by authorized consigned prices. For most of the period involved here the prices that plaintiff could charge were directly injurious to the plaintiff. At the time of the signing of the second lease of May, 1957, it was known by the parties that there would be a heavy highway construction program under way, interfering with the passage to the service station at 4010 East Ven-

tura Avenue, Fresno, California, and that this construction project would put a heavy burden on the plaintiff's volume and profits. But in the expectation that his efforts and labor would be rewarded, plaintiff signed the new lease under such expectations.

As set forth in plaintiff's Amended Complaint, there were directly competitive to the service station leased by plaintiff, three service stations which sell the product of Standard Oil Company, Tidewater-Associated Oil Company, and Richfield Oil Corporation.

On or about March, 1958, these competitive service stations lowered the price of their regular gasoline to 27.9¢ from 34.9¢. In order to meet this competition, plaintiff, after requesting authorization from defendant which was refused, lowered his price to 27.9¢. The authorized consignment price, however, had been set at 29.9¢ by defendant.

Approximately a week later, Mr. W. S. Christopher, Division Sales Manager, Fresno Area, called on plaintiff and told him that he was breaking the consignment agreement and ordered his prices up to the authorized consignment price of 29.9¢, and informed plaintiff that he would do everything in his power to cause plaintiff to conform to said prices. He implied by words and action that plaintiff's lease would not be renewed unless he raised his prices to 29.9¢.

Following said conversation, plaintiff refused to

abide by the commands of said Christopher, and persisted in setting his own retail prices.

On or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant Union Oil Company.

Plaintiff requested that he be allowed to continue to lease said property at 4010 East Ventura Avenue, Fresno, California, as is customary and usual with the defendant Union Oil Company with lessees who have been in possession of a lease for a prior period and have successfully leased the station.

The defendant refused to renew plaintiff's lease at the said service station because he refused to follow the consigned prices fixed by defendant.

This statement is supported by the files and records in this proceeding and upon the Affidavit of Maxwell Keith filed contemporaneous herewith.

Respectfully submitted,

/s/ MAXWELL KEITH.

Receipt of copy acknowledged.

[Endorsed]: Filed June 5, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF MAXWELL KEITH

Maxwell Keith, being first duly sworn, deposes and says:

He is an attorney licensed to practice before the Supreme Court of the State of California and this Court; that he is the attorney for plaintiff in the above-entitled action;

That the letters attached hereto are true copies of letters which were shown to him on May 28, 1959, by an attorney for the defendant in the above-entitled action as genuine and authentic documents of the defendant purporting to be letters sent out by the defendant's Manager or Sales Manager, with offices located at the headquarters of defendant in Los Angeles, to Division Offices explaining or giving instructions as to defendant's Retail Dealer Consignment Program, with the exception of the first letter dated November 4, 1952, which related to the service station lease policy of defendant.

A true copy of the letter transmitting these documents to affiant is attached hereto.

That the 1957 Shareholder Report of defendant showed the following figures:

Current Assets	$228,908,606
Total Working Capital, Properties and Other Assets	$605,434,553
Sales of Petroleum Products	$426,115,531
Refined Product Sales—barrels	60,404,000
Refined Product Sales—Dollars	$347,900,000
Net Earnings	$ 38,235,535

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Subscribed and sworn to before me this 5th day of June, 1959.

[Seal] /s/ JULIET BARENBOIN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires 3/7/61.

Brobeck, Phleger & Harrison
Attorneys at Law
San Francisco 4

May 28, 1959.

Maxwell Keith, Esq.,
111 Sutter Street,
San Francisco, California.

Re: Simpson v. Union

Dear Mr. Keith:

I hand you herewith, for your examination, copies of letters hereinafter enumerated. Should you wish copies of any document, kindly check it on the copy of this letter furnished you, and we will prepare them at your expense.

November 4, 1952, from Manager Sales Services.
December 24, 1954, from Sales Manager.
March 9, 1955, from R. Linden.
March 10, 1955, from R. Linden.
March 21, 1955, from Manager Sales Services.
March 23, 1955, from R. Linden.
April 7, 1955, from R. Linden.
May 6, 1955, from Manager Sales Services.

May 27, 1955, from Manager Sales Services.
July 18, 1955, from R. Linden.
September 21, 1955, from R. Linden.
October 21, 1955, from R. Linden.
January 31, 1956, from R. Linden.
March 1, 1956, from Manager Sales Services.
August 22, 1956, from R. Linden.
September 10, 1956, from R. Linden.
October 17, 1956, from R. Linden.
October 18, 1956, from Unknown.
Undated, from H. D. Seeley.
February 28, 1958 (JPS 109), R. Linden.
February 28, 1958 (EAM 195), R. Linden.
*March 7, 1958, from R. Linden.
March 10, 1958, from H. D. Seeley.
March 17, 1958, from H. D. Seeley.
April 9, 1958, from H. D. Seeley.

Very truly yours,

BROBECK, PHLEGER & HARRISON,

By MOSES LASKY.

*Teletype

ML:mg

Los Angeles, California,

November 4, 1952.

Messrs: F. K. Cadwell—San Francisco; J. W. Miller—Los Angeles; R. D. Smith—Great Falls; T. G. Wise—Seattle.

Subject: Proposed New Form—Service Station Lease

Attached is a draft of the proposed new form of service station lease. We request that you review this proposal and submit your comments and recommendations. We are particularly interested in your comments regarding Section 3, Rental Clause, Section 5, Hours of Operation, and Section 6, Maintenance and Repairs.

Please bear in mind that it will be our intention to write these leases for a term of one year, with prior cancellation only at the option of the Lessee.

It is our opinion that we should continue our basic rentals on the same policy as presently exists, that is, a gallonage rental with a flat amount for added facilities, and that the only change in our rental terms would be the stated minimums per month. These minimums could be determined from the gallonage experience of the station for the year previous to execution of the lease and to avoid inequities in the payment of minimums where the gallonage rental at the end of the year accumulated to the amount which we deemed equitable for the yearly rental, adjustment could be made. We would appreciate your suggestions as to how this could be accomplished most satisfactorily from the standpoint of dealer relations and accounting procedure. The draft contains two alternatives and perhaps you would prefer the second alternative wherein a flat amount per month, based on the same formula above mentioned would be used. Gallonage with minimum

rental or flat rental, as the case may be, would be based on estimates when new service stations are under consideration.

Clause 5, covering hours of operation, is new in our thinking and should be given careful study.

It is our opinion that the new basis for service station leases will, in actual practice, vary only in two respects from our present lease policy, these being the elimination of seven-day cancellation notice to the Lessee and the adoption of a firm one year lease, which will be offset by the inclusion of a minimum rental in the case of the gallonage terms or a flat rental to protect our interest in the property so leased.

MANAGER SALES SERVICES.

GSS:fnw

cc: Mr. Roy Linden
Mr. D. C. Gregg

10/23/52.

Service Station Lease

This Lease, made this .... day of ....., 19...., by and between Union Oil Company of California, a corporation, Lessor, and ...., Lessee,

Witnesseth:

1. Property: Lessor does hereby lease to Lessee that certain real property situate in the City of

....., County of ....., State of ....., described as follows:

together with the buildings, improvements and equipment thereon set forth in Exhibit "A" attached hereto and made a part hereof, receipt of which in good condition being hereby acknowledged. Such real and personal property is collectively hereinafter sometimes referred to as "the service station."

2. Term: The term of this lease shall commence the .... day ....., 19...., and end the.... day of ....., 19...., subject to termination by Lessee at any time on not less than ..... days' written notice to Lessor. Lessor will be under no obligation to extend or renew any lease under which it may hold the service station and in the event of any termination of such lease, this lease shall terminate forthwith.

3. Rental: A. Lessee agrees to pay Lessor as rental for said service station a sum equivalent to ..... cents ( ) per gallon for each gallon of gasoline delivered to the premises; provided, however, that in no event shall such rental be less than the following amount per calendar month specified:

January	July .....
February	August .....
March	September .....
April	October .....
May	November .....
June	December .....

For any fractional calendar month the minimum rental for that month shall be prorated in the same relation that the number of days therein for which this lease is effective bear to the full month. Lessee shall keep on said premises accurate records of all deliveries of gasoline to said premises which shall be available for Lessor's inspection and verification at any and all reasonable times. Upon demand, Lessee shall furnish Lessor with a signed sworn statement of the number of gallons of gasoline delivered during any calendar month. Gallonage rental shall be paid as, when and in the manner from time to time specified by Lessor, and any excess of minimum guaranteed monthly rental over the gallonage rental paid for that month shall be paid on or before the tenth (10th) day of the calendar month next succeeding that to which it applies.

B. Lessee agrees to pay Lessor as rental for said service station the following amount per calendar month specified:

January	July .....
February	August .....
March	September .....
April	October .....
May	November .....
June	December .....

For any fractional calendar month the minimum rental for that month shall be prorated in the same relation that the number of days therein for which this lease is effective bear to the full month.

Rental payable hereunder shall be paid on or before the ..... (Query: Should it be paid in advance or the month following?)

4. Possession: Said service station shall be used for the purpose of operating a first class motor vehicle service station and for the sale of gasoline, lubricating oil, greases, automobile tires, tubes, batteries, automotive accessories, specialties and other products customarily handled and sold in connection with the conduct of a motor vehicle service station. The service station shall not be used for any other purpose without Lessor's prior written permission, except to the extent that it is being used for other purposes on the date of this lease.

5. Hours of Operation: Lessee agrees to keep the service station open for business and properly lighted not less than .... hours per day during the months of ....., and not less than .... hours per day during the months of .....

6. Maintenance and Repairs: Lessee will keep the service station in good condition and repair and free of weeds, debris and rubbish, and will repair or replace any damage or destruction resulting from causes within Lessee's reasonable control. Lessee will return the premises upon any termination of this lease in as good condition as received, except for reasonable wear and tear and damage or destruction resulting from causes beyond Lessee's reasonable control. In the event Lessee should fail

to perform its obligations hereunder, Lessor may, at its option, clean or paint the service station or repair such damage or destruction and Lessee shall pay Lessor the cost thereof upon demand. Lessor may, at its option, repair or replace at its expense any damage or destruction resulting from causes beyond the control of Lessee. Except as hereinbefore specifically provided, Lessee shall make no additions, improvements, alterations or changes in the service station or any part thereof without Lessor's prior written consent. Lessor shall have the right to inspect the premises at all reasonable times and to enter thereon for the purposes herein set forth.

Lessee will not permit or suffer any liens, attachments, judgments or encumbrances of any kind or nature to be levied or enforced against the premises or the buildings, improvements or equipment thereon or on Lessee's interest hereunder or on Lessee's products on said premises. In the event of Lessee's failure in this regard, Lessor may pay the cost of removing any such lien, attachment, judgment or encumbrance, and Lessee will reimburse Lessor therefor upon demand.

7. Taxes and Operating Expenses: Lessee shall pay all taxes on the products, property and improvements of Lessee on the service station. Lessee will conduct its operations in strict compliance with all laws, ordinances and regulations of governmental authorities, and observe all rules of any common carrier delivering products and pay all license fees

required for Lessee's operations and all occupational business, excise or other taxes levied or imposed upon Lessee's operations or upon the handling, storage, withdrawal, distribution, sale or delivery of products handled on the service station and will pay all costs of handling, storing, distributing, and selling products handled and sold by Lessee, and all water, gas, heat and electricity or other service used in Lessee's operations. Lessee shall be exclusively liable for payment of any and all premiums, contributions and taxes for Workmen's Compensation insurance, unemployment insurance, old age benefits, annuities and retirement benefits now or hereafter imposed by or pursuant to any governmental law or regulation which are measured by the wages, salaries or remuneration paid to Lessee's employees. If Lessee fails to make any such payment, Lessor may, at its option, pay the same and Lessee will upon demand reimburse Lessor therefor.

8. Rental Abatement: Should a substantial portion of Lessor's improvements be damaged or destroyed so as to render the service station unusable for service station operations by reason of any cause beyond the control of Lessee, Lessor may terminate this lease or repair or replace such improvements, and shall make such election known to Lessee within ..... ( ) days after notice of such damage or destruction. Should Lessor elect to repair or replace such improvements, then the minimum rentals shall be abated during the period of such repairs or replacement. Rental shall not be

abated during any period of repairs or replacements necessitated by Lessee's negligence or cause within Lessee's reasonable control.

9. Termination by Lessor: Lessor may at all times enter upon the service station to view and inspect the same. If Lessee fails to pay rent or make any reimbursements as herein provided within ..... ( ) days after demand therefor by Lessor, Lessor may elect to terminate this lease and take possession of the service station. If Lessee should default in the performance of any of its obligations hereunder and shall fail to remedy such default within ..... ( ) days after notice from Lessor, Lessor may elect to terminate this lease and take possession of the premises. Should bankruptcy or insolvency proceedings under the laws of the United States or any state be instituted by or against Lessee, or should Lessee fail to secure the release of any lien, attachment, execution or encumbrance against the service station or Lessee's interest hereunder within five (5) days after levy thereof, or should Lessee assign this lease or any part thereof or attempt to sublet any portion of the premises, then Lessor may immediately and without prior notice terminate this lease and take possession of the service station.

10. Indemnity: Lessor shall not be responsible for any damage to property or for injury to or death of any person arising out of Lessee's operation or use of the premises and Lessee agrees to indemnify and save Lessor harmless therefrom.

Lessee further agrees to carry public liability and property damage insurance in amounts and with insurance carriers satisfactory to Lessor.

11. Notice: Any notices as provided herein may be given to Lessee by delivery in person or by registered mail addressed to Lessee upon or at the above-demised premises, and any notices hereunder may be given to Lessor by registered mail addressed to it at ..... Lessor may change its address at any time by written notice to Lessee.

12. Good Faith Deposit: Company hereby acknowledges receipt of the sum of Twenty-Five Dollars ($25.00) representing Good Faith Deposit, made by Lessee and it agrees to return the amount to Lessee upon expiration or sooner termination of this lease, less any monies due Company hereunder by Lessee, at such expiration or sooner termination.

13. Cancellation of Previous Agreements and Modifications: This lease cancels and supersedes any lease or other agreement of prior date between the parties hereto with reference to the possession of the demised premises and covers all the covenants, stipulations and provisions agreed upon by the parties hereto, and no employee, agent or representative of Lessor has authority to change, modify or alter the terms hereof and neither party is nor shall be bound by any inducement, statement, representation, promise or agreement not in conformity herewith.

In Witness Whereof the parties hereto have caused this lease to be executed the day and year first hereinabove written.

UNION OIL COMPANY OF CALIFORNIA,

By .....,

Lessor.

.....,

Lessee.

.....,

Lessee.

Los Angeles, California,

December 24, 1954.

JPS-710

Messrs. F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. Rath, San Francisco.

Retail Dealer Consignment Agreement

We attach draft of Retail Dealer Consignment Agreement to be used when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level. This agreement temporarily suspends our normal buy and sell arrangements on

gasoline, making the dealer our agent for the sale of our gasoline consigned to his storage.

We will pay commissions of 4½c per gallon on 76 Gasoline and 5½c per gallon on 7600 gasoline, regardless of the selling price fixed by us. These consignment agreements will not alter our rental arrangements; any rental being due from Lessees to Union Oil Company being payable out of the consignment margin. The use of this program must be first approved by Head Office covering each area and it is to be invoked only under extreme conditions.

The same terms are to be made available to all dealers affected by said conditions.

Accounting instructions will be forthcoming from Comptroller's Department and credit instructions will be forthcoming from Head Office Credit Department.

SALES MANAGER.

JPS:mh

Retail Dealer Consignment Agreement

A. Cockrell.

March 14, 1955.

This Agreement made as of this.... day of ....., 19.., between Union Oil Company of California, a corporation, Consignor, and ....., Consignee,

Witnesseth:

First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasolines as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at ..... on the terms and conditions hereinafter set forth.

Second: Consignee agrees that:

1. He will handle, advertise for sale and sell all gasolines delivered hereunder under Consignor's brands, trade-marks and names without adulteration and will maintain said brands, trade-marks and names on pumps and other facilities through which said gasolines are dispensed.

2. He will sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing.

3. He will, at his sole expense, furnish, maintain and operate all facilities and equipment and hire and pay the wages of all assistants he deems necessary or desirable for the operation of his business and they shall be under his sole direction and control and he shall be solely responsible for their acts and omissions.

4. He will be exclusively liable for the payment of any and all withholding taxes on income, premiums, contributions and taxes, for Workmen's Compensation Insurance, unemployment insurance, old age pensions, annuities and retirement benefit insurance hereinafter imposed by or pursuant to

Federal and State laws which are measured by remuneration paid to persons employed by him in connection with the storage and sale of gasoline hereunder and he will indemnify and hold Consignor harmless from any liability for any such payments. He will also indemnify and hold Consignor harmless from liability, claims or demands arising from death or injury to persons, whether or not Consignee's employees, or from damage to property occurring in connection with the conduct of his business and will maintain adequate insurance against such liability.

5. He will pay for all expenses, costs, licenses, and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business, excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimburse Consignor therefor in the event the same be paid by Consignor in the first instance. He will also conduct his operations in strict compliance with all laws, ordinances and regulations of governmental authority.

6. He will be responsible to Consignor for all gasolines consigned to him, or for loss thereof or damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion not caused by his negligence and will pay Consignor for all gasolines sold, lost or damaged as if said gasolines had been sold at Consignor's authorized

retail prices then in effect, including applicable State and Federal taxes.

7. He will keep accurate records of all gasolines delivered hereunder, their disposition and price at which sold and will promptly account upon demand for all Consignor's monies and gasolines in his possession and pay Consignor for any shortage which may develop (except as provided in 6 above) at the then applicable authorized retail sale price and will not charge against funds or any property of Consignor for which he is accountable any monies due him from Consignor. Consignor will have the right at any reasonable time to check stock on hand and inspect and audit Consignee's records and accounts.

8. He will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds.

Third: Consignor agrees that:

1. It will consign and deliver to Consignee f.o.b. Consignee's place of business specified in Section First hereof, all gasolines to be delivered hereunder by such means as it may elect.

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on

which the gross cash proceeds have been received by consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's authorized retail price for the gasoline exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof, provided, however, that said commissions shall be not less than $..... for each gallon of 7600 Regular Gasoline and $..... for each gallon of Royal 76 Gasoline.

3. It will pay the property taxes on all its gasolines in storage.

Fourth: Title to all gasolines consigned and delivered hereunder shall remain in Consignor until sold by Consignee as provided herein.

Fifth: The quantity of gasoline receipted for by Consignee shall be conclusive evidence of the quantity delivered and Consignee waives any claim against Consignor as to quantity, quality, commissions, credits, payment or settlement unless presented to Consignor in writing within ten (10) days after such delivery, sale, settlement or payment.

Sixth: All sales made by Consignee shall be for cash on delivery, provided, however, that sales may be made upon credit to specified accounts or customers holding and presenting a valid and unexpired credit card of companies from time to time specifically authorized in writing by Consignor, but only within the credit limits and terms of sale as authorized by said credit cards. Consignor may revoke such authority at any time.

If credit sales are made either above the authorized credit limit or not in accordance with the authorized terms of sale, Consignee will account to Consignor therefor in cash on demand or Consignor may deduct this amount from any commissions, monies or anything of value in its possession belonging to or due Consignee.

Seventh: Consignor may, at its option, withhold commissions, monies or anything of value in its possession belonging to or due Consignee for the purpose of reimbursing itself for any indebtedness due from Consignee.

Eighth: This agreement will be for term commencing the .... day of ....., 195.., and ending the .... day of ....., 195.., and from year to year thereafter until cancelled by either party at the end of the initial term or of any subsequent contract year upon at least 30 days' written notice to that effect. This agreement shall cease and terminate upon any termination of Consignee's right to occupy the premises described herein.

Ninth: In the event of any breach hereof, Con-

signor may revoke and terminate this agreement immediately and thereupon all consigned gasolines shall be returned to Consignor and all sums due shall be paid immediately.

Tenth: This agreement may not be assigned or transferred by Consignee without Consignor's written consent and may not be assigned by operation of law.

Eleventh: Deliveries hereunder shall be subject to interference or delay resulting from causes beyond Consignor's reasonable control.

Twelfth: This agreement shall terminate and supersede, as of the commencement date hereof, all prior agreements between the parties covering the sale and delivery of gasoline for resale at the place of business above specified. This agreement covers all the terms agreed upon by the parties and no employee or representative of Consignor has authority to change or modify its terms nor to make any statements, representations, promises or agreements not herein contained.

In Witness Whereof, the parties hereto have caused this agreement to be executed as of the day and year first above written.

UNION OIL COMPANY OF CALIFORNIA,

By .....,
Consignor.

By .....,
Consignee.

Union Oil Company of California
Los Angeles, March 9, 1955

Carbon Copy
(Personal)

In Reply Give No.
RL

A. Cockrell.
May 9, 1955.

Messrs. W. I. Martin, R. H. Rath, F. K. Cadwell,
R. D. Smith.

Retail Consignment Agency

This has reference to our previous letter under this subject and we are now having printed the forms to be used if and when it becomes necessary for us to handle in accordance with previous instructions.

So there will be no misunderstanding, the following information is presented to supplement the information contained in our first letter: A change in our selling price is necessary because of our two new Gasolines whenever we decide to drop our fair trade price, appoint our dealers as consignment agents and nominate the price for which they are to sell our Gasoline. In all cases in the neighborhood or community where we elect to do this, the selling price nominated by us for premium gasoline will

be 3c over major competition in the community and regular gasoline will be 2c over regular competition.

Where we decide to put this program into effect, it should be done quickly; in other words, follow the competitor on the hour by the hour and when the competitors move down, be flexible enough so that you can move down right along with them.

The neighborhood or the community must in all cases include all stations in the community that has been set up as the geographic area that we have previously determined is the logical area of influence of a similar price.

The margin in the consignment agreement before rent will be 5 and 5½c and we believe the agreement is self-explanatory so that after we start the program and later the cut price situation cleans up and we would nominate a price equal to or above our former fair traded price, which would be so many cents per gallon over tank wagon, the dealer's margin would advance to the same margin he normally made when we were fair trading and, of course, the dealer that could take truck and trailer deliveries would be getting ½c more margin as compared to the dealer that was given the transport differential because of the fact that he had 2,000-gallon storage but could not take truck and trailer deliveries.

/s/ R. LINDEN.

RL:dw

cc—Mr. G. S. Smith

Union Oil Company of California

Los Angeles, California, March 10, 1955

ACS, March 11, 1955

Messrs: F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. H. Rath, San Francisco; R. D. Smith, Great Falls.

Subject: Retail Dealer Consignment Agreement

We attach copies of revised Retail Dealer Consignment Agreement to be used, as outlined in our letter of March 9, when the competitive price conditions in certain neighborhoods require a change in our retail selling price, then this plan is adopted for a given trading area, which will comprise all of the area within a marketing station boundary (with the exception of those metropolitan areas which have been divided into economic trading zones), it will be offered to all dealers within the nominated area.

Contrary to the original instructions contained in our letter (JPS-710) of September 24, 1954, which provided for an agreement to temporarily suspend our normal buy and sell arrangements on gasoline, the attached agreement, when invoked, will be signed for a firm one-year period, or to an expiration date coinciding with the expiration of any service station lease in existence.

It should be noted that the following changes in the agreement and in the policy are provided for in variance with the original announcement:

Section 3rd, Paragraph 2—the commission payable will now be equal to the existing margin enjoyed by the dealer if he is selling at our minimum fair trade price, with the provision that the minimum commission will be $.05 per gallon on 7600 Regular and $.055 on Royal 76, with normal rental arrangements continuing.

You will, in preparing individual consignment agreements, fill in the alternate clause supplementing basic commission by using one of the three alternate clauses herewith as it pertains:

A. Plus $.01 per gallon of gasoline if Consignee has storage capacity upon said premises of 2,000 gallons or more.

B. Plus $.015 per gallon of gasoline if Consignee has storage capacity upon said premises large enough to receive truck and trailer or transport deliveries of gasoline of not less than 5,000 gallons per delivery.

C. Plus $.01 per gallon for each gallon of gasoline sold through a Petinco System or Smithway Inventory Control.

Selection of the alternate clause will depend entirely upon the previous method of delivery and pricing to the account following normal procedure.

You will also note in Section 3rd, Paragraph 2, that a change has been made to reflect commission payments each time we collect gross proceeds from a Consignee, or at our option (in exceptional cases)

on the 20th day of the month following such collection.

Section 8th sets forth the term of the agreement for a specified period of time and for year to year thereafter until cancelled by either party at the end of the initial term, or any subsequent year upon at least thirty (30) days' written notice to that effect.

Section 12th states that the agreement shall cancel and supersede all prior agreements between the parties covering the sale and delivery of gasoline for resale at the place of business which will be set forth in the agreement. This provision will require that you carefully checks accounts covered by combination gasoline contract and paint agreement so that upon execution of a consignment agreement a supplementary paint agreement can be executed.

The information contained in this letter and instructions outlined in our letter of March 9 should provide full detail. Accounting and credit instructions will be forthcoming.

Please refer any questions pertaining to the instructions to Head Office Sales Services.

/s/ R. LINDEN.

RL:fms

cc: Mr. R. D. Roberts, Mr. George H. Anderson, Mr. D. C. Gregg.

Retail Dealer Consignment Agreement

This Agreement made as of this .... day of ....., 19.., between Union Oil Company of California, a corporation, Consignor, and ....., Consignee,

Witnesseth:

First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasolines as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at ..... on the terms and conditions hereinafter set forth.

Second: Consignee agrees that:

1. He will handle, advertise for sale and sell all gasolines delivered hereunder under Consignor's brands, trade-marks and names without adulteration and will maintain said brands, trade-marks and names on pumps and other facilities through which said gasolines are dispensed.

2. He will sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing.

3. He will, at his sole expense, furnish, maintain and operate all facilities and equipment and hire and pay the wages of all assistants he deems necessary or desirable for the operation of his business and they shall be under his sole direction and control and he shall be solely responsible for their acts and omissions.

4. He will be exclusively liable for the payment of any and all withholding taxes on income, premiums, contributions and taxes, for Workmen's Compensation Insurance, unemployment insurance, old age pensions, annuities and retirement benefit insurance hereinafter imposed by or pursuant to Federal and State laws which are measured by remuneration paid to persons employed by him in connection with the storage and sale of gasoline hereunder and he will indemnify and hold Consignor harmless from any liability for any such payments. He will also indemnify and hold Consignor harmless from liability, claims or demands arising from death or injury to persons, whether or not Consignee's employees, or from damage to property occurring in connection with the conduct of his business and will maintain adequate insurance against such liability.

5. He will pay for all expenses, costs, licenses, and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business, excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimburse Consignor therefor in the event the same be paid by Consignor in the first instance. He will also conduct his operations in strict compliance with all laws, ordinances and regulations of governmental authority.

6. He will be responsible to Consignor for all gasolines consigned to him, or for loss thereof or

damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion not caused by his negligence and will pay Consignor for all gasolines sold, lost or damaged as if said gasolines had been sold at Consignor's authorized retail prices then in effect, including applicable State and Federal taxes.

7. He will keep accurate records of all gasolines delivered hereunder, their disposition and price at which sold and will promptly account upon demand for all Consignor's monies and gasolines in his possession and pay Consignor for any shortage which may develop (except as provided in 6 above) at the then applicable authorized retail sale price and will not charge against funds or any property of Consignor for which he is accountable any monies due him from Consignor. Consignor will have the right at any reasonable time to check stock on hand and inspect and audit Consignee's records and accounts.

8. He will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds.

Third: Consignor agrees that:

1. It will consign and deliver to Consignee f.o.b. Consignee's place of business specified in Section

First hereof, all gasolines to be delivered hereunder by such means as it may elect.

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's authorized retail price for the gasoline exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof, provided, however, that said commissions shall be not less than $.... for each gallon of 7600 Regular Gasoline and $.... for each gallon of Royal 76 Gasoline.

3. It will pay the property taxes on all its gasolines in storage.

Fourth: Title to all gasolines consigned and delivered hereunder shall remain in Consignor until sold by Consignee as provided herein.

Fifth: The quantity of gasoline receipted for by Consignee shall be conclusive evidence of the quan-

tity delivered and Consignee waives any claim against Consignor as to quantity, quality, commissions, credits, payment or settlement unless presented to Consignor in writing within ten (10) days after such delivery, sale, settlement or payment.

Sixth: All sales made by Consignee shall be for cash on delivery, provided, however, that sales may be made upon credit to specified accounts or customers holding and presenting a valid and unexpired credit card of companies from time to time specifically authorized in writing by Consignor, but only within the credit limits and terms of sale as authorized by said credit cards. Consignor may revoke such authority at any time.

If credit sales are made either above the authorized credit limit or not in accordance with the authorized terms of sale, Consignee will account to Consignor therefor in cash on demand or Consignor may deduct this amount from any commissions, monies or anything of value in its possession belonging to or due Consignee.

Seventh: Consignor may, at its option, withhold commissions, monies or anything of value in its possession belonging to or due Consignee for the purpose of reimbursing itself for any indebtedness due from Consignee.

Eighth: This agreement will be for term commencing the .... day of ....., 195.., and ending the .... day of ....., 195.., and from year to

year thereafter until cancelled by either party at the end of the initial term or of any subsequent contract year upon at least 30 days' written notice to that effect. This agreement shall cease and terminate upon any termination of Consignee's right to occupy the premises described herein.

Ninth: In the event of any breach hereof, Consignor may revoke and terminate this agreement immediately and thereupon all consigned gasolines shall be returned to Consignor and all sums due shall be paid immediately.

Tenth: This agreement may not be assigned or transferred by Consignee without Consignor's written consent and may not be assigned by operation of law.

Eleventh: Deliveries hereunder shall be subject to interference or delay resulting from causes beyond Consignor's reasonable control.

Twelfth: This agreement shall terminate and supersede, as of the commencement date hereof, all prior agreements between the parties covering the sale and delivery of gasoline for resale at the place of business above specified. This agreement covers all the terms agreed upon by the parties and no employee or representative of Consignor has authority to change or modify its terms nor to make any statements, representations, promises or agreements not herein contained.

In Witness Whereof, the parties hereto have

caused this agreement to be executed as of the day and year first above written.

UNION OIL COMPANY OF CALIFORNIA,

By .....,
Consignor.

By .....,
Consignee.

Los Angeles, California,
March 21, 1955.

JPS-147

A. Cockrell, May 9, 1955.

Messrs. F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. H. Rath, San Francisco; R. D. Smith, Great Falls.

Subject: Retail Dealer Consignment Agreement
Authorized Price

In the Second Section, paragraph 2 of subject agreement, provision is made that Consignor will specifically authorize, in writing, the prices at which Consignee is to sell Consignor's gasolines. To implement this provision it is suggested that the Territories use uniform letters of notification and for this purpose we attach drafts of desired forms. Draft-1, "Initial Notification," is to be used concurrently with the signing of each Retail Consign-

ment Agreement to authorize retail price. Draft-2, "Subsequent Notification" is to be used for any change in authorized retail price.

G. S. SMITH,
Manager, Sales Services;

By /s/ J. P. SIDFORD.

JPS:crh
Attach.

cc: J. D. Davenport, Jr.

Draft-1

Initial Notification

A. Cockrell, May 9, 1955.

Gentlemen:

Referring to that certain Retail Dealer Consignment Agreement between us dated ..... and particularly to the Second Section, paragraph 2 thereof, please be advised that effective on (date) at (hour) you are authorized to sell Consignor's gasolines at the following tax included retail prices:

Royal 76 Gasoline, $.... per gallon.
7600 Regular Gasoline, $.... per gallon.

Consignor reserves the right to change said prices from time to time.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Draft-2

Subsequent Notification

A. Cockrell, May 9, 1955.

Gentlemen:

Referring to that certain Retail Dealer Consignment Agreement between us dated ..... and particularly to the Second Section, paragraph 2 thereof, please be advised that effective on (date) at (hour) you are authorized to sell Consignor's gasolines at the following tax included retail prices:

Royal 76 Gasoline, $..... per gallon.
7600 Regular Gasoline, $..... per gallon.

The foregoing prices supersede all retail prices authorized prior to the effective date and hour indicated above. Consignor reserves the right to change said prices from time to time.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Union Oil Company of California

Los Angeles, California,

March 23, 1955.

Messrs: F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. H. Rath, San Francisco; R. D. Smith, Great Falls.

Subject: Retail Dealer Consignment Agencies

The following policy shall be effective immediately for the establishment of minimum commissions to be paid under the terms of the Retail Dealer Consignment Agreement:

(1) When gasoline storage facilities are less than 2,000 gallons the minimum commissions shall be $.06 per gallon on 7600 Regular Gasoline and $.045 per gallon on Royal 76 Gasoline.

(2) When gasoline storage facilities are 2,000 gallons or more but not sufficient to permit minimum deliveries of 5,000 gallons the minimum commissions shall be $.05 per gallon on 7600 Regular Gasoline and $.055 per gallon on Royal 76 Gasoline.

(3) When gasoline storage facilities are 2,000 gallons or more and supplemented by Smithway or Petinco installation the minimum commissions shall be $.05 per gallon on 7600 Regular Gasoline and $.055 per gallon on Royal 76 Gasoline.

(4) When gasoline storage facilities are sufficient to permit minimum deliveries of 5,000 gallons under normal distribution pattern and storage is

not supplemented by Smithway or Petinco installation the minimum commissions shall be $.0525 per gallon on 7600 Regular Gasoline and $.0575 per gallon on Royal 76 Gasoline, provided, however, that in the case of a three-party lease dealer rental terms are in accordance with policy established under our letter of March 21, subject, "Service Stations—Lessee Operation—Rental Policy." If not in accordance with this policy then minimum commissions as established under (2) above shall apply.

/s/ R. LINDEN.

GSS:faw

cc: Mr. A. C. Stewart, Mr. G. S. Smith, Mr. R. D. Roberts, Mr. D. C. Gregg, Mr. George H. Anderson, Mr. H. D. Seeley, Mr. J. P. Sidford, Mr. W. S. Penn.

Union Oil Company of California

Los Angeles,
April 7, 1955.

RL

F. K. Cadwell, Los Angeles.

G. S. Smith, April 7, 1955.

A. Cockrell, May 9, 1955.

Retail Dealer Consignment Agreements

Personal

This confirms our conversation of the 6th, when you were authorized, effective April 7, to put the

following policy into effect in the Los Angeles Basin, including San Diego, where we find it necessary to partially meet cut price activity on the part of our major competition.

The following plan is for retail consignees only:

The retail price may be set for any service station handling our products under our consignment agreement, at 1c over the price of housebrand gasoline of a major competitor, that is posted at the major station, in sight of our service station.

The consignee selling at our nominated price receives his normal margin less one-half of the cut, but his margin will not be less than 5 and 5½ before rent.

The normal differential between 7600 Regular and Royal 76 is to be maintained.

We will not allow cut price signs on our lot. By this we mean a curb sign or a flag pole sign is not to be displayed showing a discounted price per gallon for our gasoline, nor any sign which we would interpret as a price sign.

We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Rep and the Sales Manager are carefully policing the establishment of a new nominated price for any service

station so that they know it conforms with our instructions as outlined above.

/s/ R. LINDEN.

RL:dw

cc: Mr. G. S. Smith.

Los Angeles, California,

May 6, 1955.

JPS-250.

F. K. Cadwell, Los Angeles.

A. Cockrell, May 9, 1955.

Retail Dealer Consignment Agreement

Pursuant to Mr. Linden's letter of April 7, 1955, authorizing a modification of the Retail Dealer Consignment Policy for application in the Los Angeles Basin, including San Diego, the Legal Department has provided a form of letter agreement to appropriately modify Retail Dealer Consignment Agreement, Form 795-R, in respect to the revision of Section Third, Paragraph 2.

A draft copy of the approved form of letter agreement is attached.

G. S. SMITH,
Manager Sales Services;

By /s/ J. P. S.

JPS:mh

cc: Messrs. J. W. Swanson, George H. Anderson.

Mr. Dealer:

Referring to that certain Retail Dealer Consignment Agreement between us dated ....., this will confirm the agreement between us that Paragraph 2 of Section Third shall be modified effective ....., 1955, to provide as follows until such time as we may elect, on written notice to you, to reinstate the original provisions of said paragraph:

"2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's posted minimum retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at such time and place,

(Fill in Alternate Clause A, B or C From March 10, 1955, Policy Letter if Applicable.)

provided, however, that if Consignor's authorized retail price for the sale of gasoline hereunder is

less than Consignor's posted minimum retail price therefor, such commissions shall be reduced by an amount equivalent to fifty per cent (50%) of the difference between such authorized retail price and such posted minimum retail price; provided, further, however, that in no event shall said commissions be less than $.... for each gallon of 7600 Regular Gasoline and $.... for each gallon of Royal 76 Gasoline."

In all other respects said Retail Dealer Consignment Agreement shall remain in full force and effect.

Kindly signify your agreement to the foregoing by signing the duplicate copy hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Accepted and Agreed to.

By .....

Date .....

Los Angeles, California,

May 27, 1955.

A. Cockrell, June 2, 1955.

Mr. W. I. Martin, Seattle.
Mr. R. H. Rath, San Francisco.

Subject: Retail Dealer Consignment Agreement

Confirming conversation with Mr. Linden on this date, you are authorized to put the following policy into effect in designated retail zones where we find it necessary to partially meet cut price activities on the part of major competition. This plan will supplement the present Retail Dealer Consignment policy.

The retail price may be set for any service station handling our products under our Retail Dealer Consignment Agreement at $.01 per gallon over the price of Housebrand gasoline of a major competitor —that is posted major station—within the boundaries of the designated retail zone, which has first been approved by the Sales Manager.

Mr. Linden gave you authorization for those zones which you indicated to him to be in competitive position on this date and we would appreciate your written confirmation when this policy is adopted in those zones. We should be advised of any additions or deletions henceforth in this respect.

The Retail Consignee, selling at our authorized price, will receive his normal margin less one-half

of the cut, provided, however, that his margin will not be less than $.05 on regular and $.055 on premium before rent. The normal retail differential between 7600 Regular and Royal 76 is to be maintained.

Operation of the above plan will require that each Retail Dealer Consignment Agreement be modified in respect to Paragraph 2 of Section 3rd, which covered the calculation of commissions. To accomplish such modification, we attach a draft of a form letter which should be accepted by each Retail Consignee.

Accounting instructions and credit instructions as issued in connection with our regular Retail Consignment Agreement will also apply to these agreements when modified in accordance with the above.

MANAGER SALES SERVICES.

GSS:fmw
Attch.

cc: Mr. G. H. Anderson, Mr. R. D. Roberts, Mr. S. Biehn, San Francisco; Mr. R. H. Clark, Seattle.

bcc: Mr. J. P. Sidford.

A. Cockrell, June 2, 1955.

Mr. Dealer:

Referring to that certain Retail Dealer Consignment Agreement between us dated ....., this

will confirm the agreement between us that Paragraph 2 of Section Third shall be modified effective ....., 1955, to provide as follows until such time as we may elect, on written notice to you, to reinstate the original provisions of said paragraph:

"2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's posted minimum retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at such time and place,

(Fill in Alternate Clause A, B or C From March 10, 1955, Policy Letter if Applicable.)

provided, however, that if Consignor's authorized retail price for the sale of gasoline hereunder is less than Consignor's posted minimum retail price therefor, such commissions shall be reduced by an amount equivalent to fifty per cent (50%) of the

difference between such authorized retail price and such posted minimum retail price; provided, further, however, that in no event shall said commissions be less than $..... for each gallon of 7600 Regular Gasoline and $..... for each gallon of Royal 76 Gasoline."

In all other respects said Retail Dealer Consignment Agreement shall remain in full force and effect.

Kindly signify your agreement to the foregoing by signing the duplicate copy hereof at the place indicated and return the same to us.

Very truly yours,

UNON OIL COMPANY OF CALIFORNIA,

By .....

Accepted and Agreed to

By .....

Date .....

Union Oil Company of California

915.5

Los Angeles, California,

July 18, 1955.

In Reply Give No. JPS-339

A. Cockrell, July 20, 1955.

Messrs.: F. K. Cadwell—Los Angeles; W. I. Martin—Seattle; R. H. Rath—San Francisco; R. D. Smith—Great Falls.

Subject: Retail Dealer Consignment Agencies.

The following item (5) supplements our letter of March 23, 1955, in which the minimum commissions to be paid under the terms of the Retail Dealer Consignment Agreement are established:

(5) When gasoline storage facilities are those of a distributor, the minimum commissions will be $.05 per gallon on 7600 Regular Gasoline and $.055 per gallon on Royal 76 Gasoline.

/s/ R. LINDEN.

JPS:crh

cc: Mr. A. C. Stewart, Mr. G. S. Smith, Mr. R. D. Roberts, Mr. D. C. Gregg, Mr. George H. Anderson, Mr. H. D. Seeley, Mr. J. P. Sidford, Mr. W. S. Penn.

F. Wilkerson, July 19, 1955.

Mr. A. C. Stewart.

September 22, 1955—J. I.

Union Oil Company of California

Los Angeles, California,

September 21, 1955.

Messrs.: F. K. Cadwell—Los Angeles; W. I. Martin—Seattle; R. H. Rath—San Francisco; R. D. Smith—Great Falls.

ACS. September 26, 1955.

Subject: Retail Dealer Consignment Agreements.

Confirming agreement reached at the Territory Managers' meeting on September 19, the following instructions will modify subject program:

Effective immediately, we will discontinue the zoning method of establishing retail prices at consignment stations. Where you find it necessary to partially meet cut price activity on the part of our major competition, the retail price may be set for any service station handling our products under our Consignment Agreement at $.01 per gallon over the price of Housebrand gasoline of a major competitor that is posted at the major station in sight of our service station. Where a major competitor is posting below normal prices in the proximity of our station but not actually in sight and where no other major station is within sight, the above may also be adopted if such activity on the part of the competitor is within a true trading area influence and is affecting sales at our station.

The normal differential between 7600 and Royal 76 is to be maintained.

Accurate records of all changes, and the reasons therefor, in nominated retail prices are to be main-

tained in the territory offices. Head Office will not require this information.

You will continue to supply us with the monthly report covering consignment service stations as previously requested.

These instructions supersede and modify our original letter on the above subject dated March 9, 1955, and further modification in letter of May 27, 1955, from the Manager of Sales Services. All other provisions of the Retail Consignment Agency Agreement, such as commissions and accounting procedure, remain unchanged.

/s/ R. LINDEN.

GSS:fmw

cc: Mr. D. C. Gregg.

Union Oil Company of California

Los Angeles, California,

October 21, 1955.

In Reply Give No. JPS-514.

Messrs.: F. K. Cadwell—Los Angeles; W. I. Martin—Seattle; R. H. Rath—San Francisco.

Retail Dealer Consignment Agreement

To implement the revised Retail Dealer Consignment program, as set forth in our letter of September 21, 1955, and to provide for commissions equal to Dealers' Normal Margin in those trading areas

where, under normal conditions, Dealers and prevailing retail prices are above our posted retail minimum price, modification of Retail Dealer Consignment Agreement, Form 795-R, Section Third, Paragraph 2, is required as follows:

A. In those instances where a service station is converted to Retail Dealer Consignee, modify agreement Form 795-R (Print 4-55), Section Third, Paragraph 2, per Draft A, attached, pending receipt of new form being printed.

B. In those instances where Dealer is now operating under Retail Dealer Consignment agreement which has not been previously modified, modify Section Third, Paragraph 2, by letter agreement per Draft B, attached.

C. In those instances where Dealer is now operating under Retail Dealer Consignment Agreement which has been modified by letter agreement in accord with Policy letter of April 7, 1955, in a portion of Southwest Territory, or Policy letter of May 27, 1955, in Central and Northwest Territory, further modify Section Third, Paragraph 2, by letter agreement per Draft C, attached.

/s/ R. LINDEN,
Sales Manager.

JPS:crh

cc: J. D. Davenport—Building; A. C. Stewart—Building; R. Linden—Building.

bcc: Mr. H. D. Seeley—Please reprint Form 795-R per approved copy attached.

Draft B

Mr. Dealer:

Referring to that certain Retail Dealer Consignment Agreement between us dated ....., this will confirm the agreement between us that Paragraph 2 of Section Third shall be modified effective ....., 1955, to provide as follows until such time as we may elect, on written notice to you, to reinstate the original provisions of said paragraph:

"2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's authorized retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at such time and place of the sale thereof,

(Fill in Alternate Clause A, B or C from March 10, 1955, Policy Letter if Applicable.)

provided, however, that if Consignor's authorized retail price for the sale of gasoline hereunder is less than Consignor's posted minimum retail price therefor, such commissions shall be reduced by an amount equivalent to fifty per cent (50%) of the difference between such authorized retail price and such posted minimum retail price; provided further, however, that in no event shall said commissions be less than $..... for each gallon of 7600 Regular gasoline and $..... for each gallon of Royal 76 Gasoline."

As herein modified, all the terms and provisions of said Retail Dealer Consignment Agreement shall remain in full force and effect.

Kindly signify your agreement to the foregoing by signing the duplicate copy hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Accepted and Agreed to

By .....

Date .....

Draft C

Mr. Dealer:

Referring to that certain Retail Dealer Consignment Agreement between us dated ....., this will confirm the agreement between us that Paragraph 2 of Section Third as modified by letter agreement between us dated ....., shall be further modified effective ....., 1955, to provide as follows until such time as we may elect, on written notice to you, to reinstate the original provisions of said paragraph as set forth in said Retail Dealer Consignment Agreement:

"2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's authorized retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at such time and place of the sale thereof,

(Fill in Alternate Clause A, B or C from March 10, 1955, Policy Letter if Applicable.)

provided, however, that if Consignor's authorized retail price for the sale of gasoline hereunder is less than Consignor's posted minimum retail price therefor, such commissions shall be reduced by an amount equivalent to fifty per cent (50%) of the difference between such authorized retail price and such posted minimum retail price; provided further, however, that in no event shall said commissions be less than $..... for each gallon of 7600 Regular Gasoline and $..... for each gallon of Royal 76 Gasoline."

As herein modified, all the terms and provisions of said Retail Dealer Consignment Agreement shall remain in full force and effect.

Kindly signify your agreement to the foregoing by signing the duplicate copy hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Accepted and Agreed to

By .....

Date .....

Draft A

Retail Dealer Consignment Agreement

This Agreement made as of this ..... day of ....., 19...., between Union Oil Company of California, a corporation, Consignor, and ....., Consignee,

Witnesseth:

First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasolines as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at ....on the terms and conditions hereinafter set forth.

Second: Consignee agrees that:

1. He will handle, advertise for sale and sell all gasolines delivered hereunder under Consignor's brands, trade-marks and names without adulteration and will maintain said brands, trade-marks and names on pumps and other facilities through which said gasolines are dispensed.

2. He will sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing.

3. He will, at his sole expense, furnish, maintain and operate all facilities and equipment and hire and pay the wages of all assistants he deems necessary or desirable for the operation of his business

and they shall be under his sole direction and control and he shall be solely responsible for their acts and omissions.

4. He will be exclusively liable for the payment of any and all withholding taxes on income, premiums, contributions and taxes, for Workmen's Compensation Insurance, unemployment insurance, old age pensions, annuities and retirement benefit insurance hereinafter imposed by or pursuant to Federal and State laws which are measured by remuneration paid to persons employed by him in connection with the storage and sale of gasoline hereunder and he will indemnify and hold Consignor harmless from any liability for any such payments. He will also indemnify and hold Consignor harmless from liability, claims or demands arising from death or injury to persons, whether or not Consignee's employees, or from damage to property occurring in connection with the conduct of his business and will maintain adequate insurance against such liability.

5. He will pay for all expenses, costs, licenses, and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business, excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimburse Consignor therefor in the event the same be paid by Consignor in the first instance. He will also conduct his operations in strict compliance

with all laws, ordinances and regulations of governmental authority.

6. He will be responsible to Consignor for all gasolines consigned to him, or for loss thereof or damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion not caused by his negligence, and will pay Consignor for all gasolines sold, lost or damaged as if said gasolines had been sold at Consignor's authorized retail prices then in effect, including applicable State and Federal taxes.

7. He will keep accurate records of all gasolines delivered hereunder, their disposition and price at which sold and will promptly account upon demand for all Consignor's monies and gasolines in his possession and pay Consignor for any shortage which may develop (except as provided in 6 above) at the then applicable authorized retail sale price and will not charge against funds or any property of Consignor for which he is accountable any monies due him from Consignor. Consignor will have the right at any reasonable time to check stock on hand and inspect and audit Consignee's records and accounts.

8. He will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall

be segregated from and not commingled with other funds.

Third: Consignor agrees that:

1. It will consign and deliver to Consignee f.o.b. Consignee's place of business specified in Section First hereof, all gasolines to be delivered hereunder by such means as it may elect.

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in Section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's authorized retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at such time and place of the sale thereof, provided, however, that if Consignor's authorized retail price for the sale of gasoline hereunder is less than Consignor's posted minimum retail price therefor, such commissions shall be reduced by an amount equivalent to fifty per cent (50%) of the

difference between such authorized retail price and such posted minimum retail price; provided further, however, that in no event shall said commissions be less than $.... for each gallon of 7600 Regular Gasoline and $.... for each gallon of Royal 76 Gasoline.

3. It will pay the property taxes on all its gasolines in storage.

Fourth: Title to all gasolines consigned and delivered hereunder shall remain in Consignor until sold by Consignee as provided herein.

Feb. 1, 1956, J. I.

Union Oil Company of California

Los Angeles, California,

January 31, 1956.

In Reply Give No. JPS-70.

Messrs. F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. H. Rath, San Francisco; R. D. Smith, Great Falls.

Subject: Retail Dealer Consignment Agencies

The following restatement of minimum commissions to be paid under the terms of the Retail Dealer Consignment Agreement supersedes, without change, letters of March 23, 1955, and July [illegible],

1955, and adds minimum commission applicable to "Truck Stations."

(1) When gasoline storage facilities are less than 2,000 gallons the minimum commissions shall be $.04 per gallon on 7600 Gasoline and $.045 per gallon on Royal 76 Gasoline.

(2) When gasoline storage facilities are 2,000 gallons or more but not sufficient to permit minimum deliveries of 5,000 gallons the minimum commissions shall be $.05 per gallon on 7600 Gasoline and $.055 per gallon on Royal 76 Gasoline.

(3) When gasoline storage facilities are 2,000 gallons or more and supplemented by Smithway or Petinco installation the minimum commissions shall by $.05 per gallon on 7600 Gasoline and $.055 per gallon on Royal 76 Gasoline.

(4) When gasoline storage facilities are sufficient to permit minimum deliveries of 5,000 gallons under normal distribution pattern and storage is not supplemented by Smithway or Petinco installation the minimum commissions shall be $.0525 per gallon on 7600 Gasoline and $.0575 per gallon on Royal 76 Gasoline, provided, however, that in the case of a three-party lease dealer rental terms are in accordance with policy established under our letter of March 21, subject, "Service Stations—Lessee Operation—Rental Policy." If not in accordance with this policy then minimum commissions as established under (2) above shall apply.

(5) When gasoline storage is that of a "Truck Station" the minimum commissions shall be $.0525 per gallon on 7600 Gasoline and $.0575 per gallon on Royal 76 Gasoline.

(6) When gasoline storage facilities are those of a distributor the minimum commissions will be $.05 per gallon on 7600 Gasoline and $.055 per gallon on Royal 76 Gasoline.

/s/ R. LINDEN.

JPS:crh

cc: Mr. A. C. Stewart, Mr. G. S. Smith, Mr. R. D. Roberts, Mr. D. C. Gregg, Mr. G. H. Anderson, Mr. H. D. Seeley, Mr. J. P. Sidford, Mr. W. S. Penn.

Union Oil Company of California

Los Angeles, California,

March 1, 1956.

In Reply Give No. JPS-125.

ACS, March 2, 1956.

Messrs. F. K. Cadwell, Los Angeles; W. I. Martin, Seattle; R. H. Rath, San Francisco; R. D. Smith, Great Falls.

Retail Dealer Consignment Agreement

With the objective of establishing a formula and wording of agreement provisions that will assure

uniform and accurate calculations of commissions, under variable conditions, paragraph 2 of Section Third is to be revised in accordance with the following:

2. It will pay Consignee commissions in the amounts hereinafter set forth on sales of Consignor's gasolines made in accordance with this agreement on which the gross cash proceeds have been received by Consignor as herein provided or as to which Consignor has received proper evidence of the authorized credit sale thereof as provided in section Sixth hereof. Such commissions will be payable at the time of receipt of such proceeds or evidence of credit sale or, at Consignor's option, on or before the 20th day of the calendar month following that within which such proceeds or evidence were received. Commissions so payable will be in the amount by which Consignor's posted minimum retail price for the gasoline in effect at the time and place of sale exceeds Consignor's posted tank wagon price therefor applicable to 400 gallon deliveries thereof in effect at the time and place of the sale thereof,

(Fill in Alternate Clause A, B or C From March 10, 1955, Policy Letter if Applicable.)

provided, however, that:

A. When Consignor's authorized retail price for the sale of the gasoline hereunder in effect at the time and place of sale thereof is more than Consignor's posted minimum retail price for such gaso-

line in effect at the time and place of sale thereof, such commission shall be increased by the full amount of the difference between such posted minimum retail price and such authorized retail price.

B. When Consignor's authorized retail price for the sale of the gasoline hereunder in effect at the time and place of sale thereof, is less than Consignor's posted minimum retail price for such gasoline in effect at the time and place of sale thereof, such commission shall be reduced by an amount equivalent to fifty per cent (50%) of the difference between such authorized retail price and such posted minimum retail price.

Provided, further, however, that in no event shall said commissions be less than $.... for each gallon of 7600 Gasoline and $.... for each gallon of Royal 76 Gasoline.

This revised form of paragraph 2 does not modify present policy in any way. We suggest, however, that Form 795-E, print date 11-55, be modified as above pending reprint which will be made at an early date. In the event modification of any agreement now in effect is desired, we believe one of the letter forms attached to our letter JPS-514 of October 21, 1955, will be appropriate, or, if further assistance is needed, please let us know.

G. S. SMITH,
Manager, Sales Services;

By /s/ J. P. SIDFORD.

JPS:crh

cc: Messrs. J. D. Davenport, A. C. Stewart, R. Linden, H. D. Seeley.

March 1, 1956, J. I.

915.5.

JPS-398.

Los Angeles, California,
August 22, 1956.

A. Cockrell, Aug. 24, 1956.

Messrs. F. K. Cadwell, Petroleum Bldg.; R. D. Davis, Salt Lake City; W. I. Martin, Seattle; R. H. Rath, San Francisco.

Subject: Retail Dealer Consignment Agreement, Authorized Prices

Effective at once, the following will cancel and supersede entirely our letter JPS-147 of March 21, 1955:

In the Second Section, paragraph 2, of subject Agreement, provision is made that Consignor will specifically authorize, in writing, the prices at which Consignee is to sell Consignor's gasolines. To implement this provision, it is desired that the Territories use uniform letters of notification. Three letters are attached, description, use and handling of each is as follows:

(1) Letter form identified as 795-R, PN-1. This form letter to be prepared on Union Oil Company letterhead which will show address of originating office and date. Is to be used only for the initial price notification concurrently with the signing of each Retail Consignment Agreement.

(2) Letter form identified as 795-R, PN-2. This form letter is to be prepared on Union Oil Company letterhead which will show address of originating office and date. Is to be used for any change in authorized retail prices.

(3) Form letter identified 795-R, DPNA (Dealers Price Notification Acknowledgment). This form letter should preferably be prepared by dealer on his own stationery or otherwise on plain paper. It should be addressed to Union Oil Company of California at the address of the office which originated the price notification.

When either of the above price notification letters are handed to a dealer, the company representative will write a statement across the bottom of the copy which he will return to the Territory office reading:

"Reference Seller is ..... at .....
whose posted price is ....."

This record of competitive posting is to support dealer's acknowledgement that authorized prices are necessitated by competition.

/s/ R. LINDEN,
Sales Manager.

JPS:oy
Attach.

cc: D. C. Gregg, Building; R. Linden, Building;
J. P. Sid d, Building.

J. P. S., 2 Aug. 1956.

795-R, PN-1.

A. Cockrell, Aug. 24, 1956.

Price Notification

Gentlemen:

Referring to that certain Retail Dealer Consignment Agreement between us dated ..... and particularly the Second Section, Paragraph 2 thereof, please be advised that effective on (date) at (hour) you are authorized and directed to sell Consignor's gasolines at the following tax included retail prices:

Royal 76 Gasoline, $.... per gallon.

7600 Gasoline, $.... per gallon.

Consignor reserves the right to change said prices from time to time.

Pursuant to your agreement with us, your commission on the above selling prices will be $.... per gallon on Royal 76 and $.... per gallon on 7600 Gasoline.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

795-R, PN-2.

A. Cockrell, Aug. 24, 1956.

Price Notification

Gentlemen:

Referring to that certain Retail Dealer Consignment Agreement between us dated ..... and particularly to the Second Section, paragraph 2 thereof, please be advised that effective on (date) at (hour) you are authorized and directed to sell Consignor's gasolines at the following tax included retail prices:

Royal 76 Gasoline, $.... per gallon.

7600 Gasoline, $.... per gallon.

The foregoing prices supersede all retail prices authorized prior to the effective date and hour indicated above. Consignor reserves the right to change said prices from time to time.

Pursuant to your agreement with us, your commission on the above selling prices will be $.... per gallon on Royal 76 and $.... per gallon on 7600 Gasoline.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

795-R, DPNA.

A. Cockrell, Aug. 24, 1956.

..... (Date)

Union Oil Company of California
(Address of office originating price notification).

Gentlemen:

This will acknowledge receipt of your Price Notification of ....., 19... I concur that these prices are necessitated by competition.

Very truly yours,

By .....

A. Cockrell, Sept. 18, 1956.

RL.

Los Angeles,
September 10, 1956.

Messrs. F. K. Cadwell, R. H. Rath, W. I. Martin, R. D. Davis.

Retail Consignment Program

This confirms our telephone conversation in connection with a change in policy effective the morning of the 11th. We agree that regardless of the price that we nominate as his selling price, the re-

tail commission agent's commission shall be not less than his commission when the selling price was our minimum retail.

We confirmed that we will continue with the present policy of posting curb signs and selling in cut price areas at 1c above the major posted sign in sight.

We advised you that every possible effort must be continually exerted to get all of our dealers on a consignment program.

No other change in our policy.

RL:dw

Mr. Davis:

We did not telephone you because you are operating with a little different policy than this in certain locations. The above is for your information.

R. LINDEN.

bc—Mr. A. R. Ousdahl.

915.5.

RL.

A. Cockrell, Nov. 7, 1956.

Los Angeles,
October 17, 1956.

Messrs. F. K. Cadwell, R. H. Rath, W. I. Martin, R. D. Davis.

Retail Consignee

Our attempt has been to strenuously solicit the change over from products contract to consignee agreements and this effort must be continued and accelerated as we expect that in the near future we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business.

In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two-party deal or 'other' and the only paper we will write is a one-year consignment agreement.

RL:dw

cc—Mr. Ousdahl.

EAM-1914.

Los Angeles, California,
October 18, 1956.

Mr. F. K. Cadwell, Petroleum Building; Mr. R. D. Davis, Salt Lake City; Mr. W. I. Martin, Seattle; Mr. R. H. Rath, San Francisco.

Retail Dealer Consignment Agreement
Authorized Prices

Effective immediately Form letter 795-R, DPNA (Dealers Price Notification Acknowledgment), will be in the form of the attached.

Subject to the change in the form of this one letter all the instructions contained in our letter JPS-398 of August 22, 1956, will remain in effect.

This change in the form of the letter is necessitated by the inappropriateness of the present form where our authorized prices are being increased.

VICE PRESIDENT.

EAM:ce

Attachment

cc: Mr. A. R. Ousdahl, Mr. J. P. Sidford.

795-R, DPNA.

..... (Date)

Union Oil Company of California
(Address of office originating price notification.)

Gentlemen:

I (we) acknowledge receipt of your price notification of ....., 195.., and will abide thereby.

Very truly yours,

.....

Union Oil Company of California

EAM-1210.

Division Managers, Dealer Sales.

Retail Dealer Consignment Program

The Territories made certain recommendations as to changes in forms which would have the effect

of reducing the amount of paper work involved in lessee changes. These recommendations were consolidated in a letter from Mr. T. W. Proudfoot (TWP-747), dated September 18, 1957, to Mr. J. U. Witt. The recommendations have been reviewed by Management and they are agreeable to making all the changes except as to the Fair Trade Acts Agreement, Form 965 and Schedule A thereto, Form 965-A. You will continue to have this Agreement signed as to lubricating oils.

Effective immediately, it will no longer be necessary to obtain a price acknowledgment letter from the dealer when new prices are nominated by the Company. The dealer may acknowledge receipt of such prices on a copy of Form 795-R-PN2.

It will not be necessary that you obtain a mutual cancellation of the dealer consignment agreement when the dealer tenancy is being terminated as the consignment agreement terminates with the 909 Lease. However, you will continue to get mutual cancellations in the case of 100% accounts and in the cases where a lessee is being taken off consignment but is retaining tenancy of the service station.

The Legal Department is reviewing a proposed new form for consignment which will incorporate a workable gallonage and delivery authorization provision. If the new form is approved you will be notified in order that you may obtain a supply of the form from the stationery warehouse. The Legal Department is also reviewing a proposed form 909

which will incorporate the Imprinter Subrental Agreement therein.

An additional space will be provided in the Form 891 to show the reason for dealer change. However, this will not be accomplished until the Form 891 comes up for reprint.

Mr. J. U. Witt will handle the combining of Forms 311-F and 311-G.

H. D. SEELEY,
Supervisor, Properties & Records;

By /s/ E. A. McFADDEN.

EAM/mdj

cc: R. H. Rath, J. U. Witt.

In Reply Give No. JPS-109.

Union Oil Company of California

Los Angeles 17, California,
February 28, 1958.

To Division Managers, Dealer Sales.

Subject: Retail Pricing Policy.

Effective March 1, 1958, the following Retail Pricing Policy is applicable in all areas except Alaska, Hawaii, Montana, Wyoming and North Dakota in which areas no change will be made:

1. Dealer Sales posted tank wagon prices are established for Royal 76 Gasoline and 7600 Gasoline uniformly at $.005 per gallon over the customary Direct Sales posted tank wagon prices.

2. Normal Retail Prices will be $.045 per gallon over Union's Dealer Sales posted tank wagon price for both Royal 76 Gasoline and 7600 Gasoline.

3. Retail Dealer Consignee Commission will be the difference between Normal retail and 400 gallon Dealer Sales posted tank wagon price plus method of delivery differential applicable provided:

A. In the event Authorized Retail price is above Normal Retail consignee commission shall be increased by an amount equal to 80% of the difference between Normal Retail and Authorized Retail, and

B. In the event Authorized Retail price is below Normal Retail consignee commission shall be reduced by an amount equal to 20% of the difference between Normal Retail and authorized Retail.

4. Dealer retail prices as authorized for Consignee Dealers, and recommended for Non-consignee Dealers, will be established as follows:

A. Normal or above normal markets, all areas: Prices on both Royal 76 and 7600 Gasolines will equal predominant competitive major gasoline prices.

B. Depressed Markets: Subject to General provision C (1).

No. 17308

United States
Court of Appeals
for the Ninth Circuit

RICHARD S. SIMPSON,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 283 to 562)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 5/12/51—Printed 6/6/51

(1) In all areas excluding Montana, Wyoming, North Dakota and portions of Rocky Mountain Division covered in 4 B (2) below:

(a) 7600 Gasoline will be equal to predominant competitive major prices or Standard Stations, Inc., prices if latter are lower.

(b) Royal 76 Gasoline will be $.05 per gallon over the authorized 7600 Gasoline price, but not more than $.01 over predominant competitive major prices.

(2) In that portion of Rocky Mountain Division, Dealer Sales, which is within the States of Nevada, Oregon, Idaho and Utah:

(a) 7600 Gasoline will be equal to the predominant competitive major gasoline price.

(b) Royal 76 Gasoline will be $.005 per gallon above the predominant major competitive premium price provided that the differential between 7600 and Royal 76 Gasolines will not be less than normal.

(3) In depressed retail price areas upon receipt of a statement from distributor at the end of each calendar month showing volume sold at each retail station at prices below Union's normal retail price applicable at each such retail station, you may reduce distributors' price on that volume by an amount equal to 80% of the difference between the normal retail price and the depressed retail price as would be authorized by Union for Retail Consignees in Distributor's area.

Margin to distributors' retail dealer is an obligation of distributor and is not protected by Union.

C. General Provisions:

(1) Any reduction in prices below Normal Retail prices, or any further changes in price that are at any time below Normal Retail are to receive prior approval of the General Sales Manager, Dealer Sales.

/s/ R. LINDEN.

JPS:cm

cc: S. Biehn, San Francisco; J. L. Broughten (4), F. K. Cadwell (4), J. C. Garvey, Philadelphia, Pa. (10); A. D. Gray (4); L. D. Murray, Seattle; R. H. Rath, H. M. Schafer, E. M. C. Smith, W. L. Spencer, Division Managers, Dealer Sales; Division Managers, Direct Sales.

In Reply Give No. EAM-195.

Union Oil Company of California

Los Angeles, California,
February 28, 1958.

Division Managers, Dealer Sales

Retail Dealer Consignment Agreement
Commission Policy

In conjunction with the new Retail Pricing Policy outlined in Mr. R. Linden's letter of Feb-

ruary 28, 1958, our commission policy as to retail consignment will be as follows:

1. When our authorized retail price is more than the normal retail price, the consignee's commission will be increased by an amount equivalent to eighty per cent of any such increase of the authorized retail price over the normal retail price.

2. When our authorized retail price is less than the normal retail price, the consignee will absorb twenty per cent (20%) of any such reduction of the authorized retail price under the normal retail price.

3. There will no longer be minimum commissions shown in the agreement:

Form 795-R, Retail Dealer Consignment Agreement, has been revised to incorporate a new commission payment section reflecting the above.

Paragraph 8 of Section Second of said agreement has been revised to require the consignee to account to us for all monies derived from the sale of gasoline but in no event less than our authorized retail price.

All dealers will be signed to the new consignment agreement as soon as practicable; however, the minimum commissions will remain at their present level for an indeterminate period of time and this will be handled by the use of the attached "Letter No. 1."

The change to the new consignment agreement will be handled as follows:

1. New dealers will be signed to the new agreement and concurrently therewith they will be given Letter No. 1 which will be effective until all consignees in the applicable specified geographical area are on the new commission schedule.

2. You will urge our present dealers to sign a mutual cancellation of their consignment agreement and after such cancellation you will sign them to the new consignment agreement and concurrently therewith give them Letter No. 1 which will be effective as set forth in "1" above.

3. You will review the consignment agreements of those dealers who refuse to sign a mutual cancellation of such agreement and you will serve a thirty-day notice of cancellation at the applicable time. After such cancellation you will sign the dealer to the new consignment agreement and give him Letter No. 1 which will be effective as previously stated. It is imperative that you do not miss a cancellation date because by doing so you could delay the effective date of this new commission policy by one year.

It is hoped that this program can be made completely effective before April 30, 1959.

We can make this policy effective by specified geographical areas without regard to the fact that all the consignees in our entire sales area may not be on the same basis. You will not put the policy

into effect in any area until you have received permission to do so from the General Sales Manager, Dealer Sales, at Home Office.

For your guidance a specified geographical area will be an area which does not conflict competitively with another area. As an illustration, Santa Barbara, California, would be a specified geographical area where the policy could be put into effect without regard to areas such as Santa Maria, Ventura, etc.; however, North Hollywood, California, could not be considered a specified geographical area for this purpose in relation to Van Nuys, Burbank, etc.

Form 795-R is being reprinted and a supply of the new form will be forwarded to you.

/s/ R. LINDEN.

EAM:em
Attachments

cc: A. C. Stewart, R. H. Rath, A. R. Ousdahl, J. P. Sidford.

Union Oil Company of California

Letter No. 1.

Dear Sir:

Referring to that certain Retail Dealer Consignment Agreement between us of even date herewith, and particularly to Paragraph 2 of Section Third thereof, please be advised that until further notice,

when our authorized retail tax-included price is more than our posted normal retail tax-included price your commissions will be increased by the full amount of the difference between such posted normal retail tax-included price and such authorized retail tax-included price and provided further that in no event will your commissions be less than .... cents for each gallon of 7600 Gasoline and .... cents for each gallon of Royal 76 Gasoline.

We reserve the right to revoke this letter at any time by written notice to you, whereupon this letter shall be of no further force or effect and the commissions shall be as set forth in said Paragraph 2 of Section Third of said agreement.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

915.5

A. COCCHELL

MAR 18 1959

Union Oil Company of California

Los Angeles, California,
March 10, 1958.

In Reply Give No. EAM-223.

Division Managers, Dealer Sales

Subject: Retail Dealer Consignment Agreement

Further to Mr. Linden's letter EAM-195, dated February 28, 1958, and particularly paragraph numbered 3 at the top of page 2 thereof, we attach a form of cancellation letter which is to be used when cancelling a consignment agreement.

The letter should be made in duplicate and delivered to the dealer personally by our representative. If possible, we should obtain the dealer's acknowledgment of receipt of the cancellation. If a dealer refuses to acknowledge receipt our representative should witness the time and date that he delivered the cancellation.

The letter should be delivered well in advance of the 30-day cancellation period.

H. D. SEELEY,
Supervisor, Properties and
Records;

By /s/ E. A. McFADDEN.

EAM:em
Attachment

cc: R. H. Rath.

Union Oil Company of California

Retail Dealer Consignee,
Address,
City, State.

Dear Sir:

Pursuant to Section Eighth of that certain Retail Dealer Consignment Agreement between you as Consignee and the undersigned as Consignor dated ....., 19.., whereby you were appointed our Consignee for the sale of our gasolines at your place of business at ....., for the term beginning the .... day of ....., 19.., and ending the .... day of ....., 19.., and continuing from year to year thereafter unless or until cancelled by either party at the end of the initial term or at the end of any subsequent contract year by at least 30 days' written notice to the other party to that effect, notice is hereby given that the undersigned intends to and does hereby cancel and terminate said agreement, said cancellation and termination to be and become effective at the end of the present contract year which is the .... day of ....., 19...

UNION OIL COMPANY OF CALIFORNIA,

By .....

Dated at ....., ..., 19...

Received ....., 19...

.....,

Consignee.

Union Oil Company of California

Los Angeles, California,
March 17, 1958.

In Reply Give No. EAM-236.

To: Division Managers, Dealer Sales

Subject: Retail Dealer Consignment Agreement

As stated in our teletype of February 28, we attach a revised form of letter to be given to our dealers concurrently with their signing the new form of Consignment Agreement.

The letter states that until further notice commissions will be based on the difference between our posted normal retail price and our posted tank wagon price rather than the difference between posted normal retail price and posted Dealer Sales tank wagon price. Further, the dealer will be allowed to keep all of the authorized add-ons and we will absorb all authorized reductions below normal retail.

We have made the following changes in the new Consignment Agreement which are in addition to the changes outlined in Mr. Linden's letter EAM-195, dated February 28, 1958:

1. "Gasoline Trust Account" provision has been changed from a mandatory to an optional provision.

2. Section Ninth has been revised to provide that in the event the agreement is terminated or Consignee breaches the agreement, we may lock the

pumps until such time as we can remove the gasoline. This provision is not to be used indiscriminately. If time permits, the Credit Department should be consulted and their agreement obtained before any locking of pumps.

H. D. SEELEY,
Supervisor, Properties and Records;

By /s/ E. A. McFADDEN.

EAM:em
Attachment

cc: R. H. Rath.

Union Oil Company of California

Consignee
(Address),
(City & State).

Dear Sir:

Referring to that certain Retail Dealer Consignment Agreement between you and us of even date herewith, it is agreed, until this letter is terminated by us, that:

(a) Reference to "Consignor's posted Dealer Sales tank wagon ex-tax price" shall be deemed to be Consignor's posted tank wagon ex-tax price;

(b) Your commissions under paragraph 2 of Section Third will in no event be less than ....

cents for each gallon of 7600 Gasoline and .... cents for each gallon of Royal 76 Gasoline; and

(c) When our authorized retail tax-included price exceeds our posted normal retail tax-included price, your commission will include the full amount of such excess.

We reserve the right to terminate this letter agreement in whole or in part at any time by written notice to you.

Please signify your agreement to the foregoing by signing the duplicate hereof at the place indicated and return the same to us.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA,

By .....

Agreed to:

....,

Consignee.

Union Oil Company of California

Los Angeles, California,
April 9, 1958.

In Reply Give No. EAM-297.

Division Managers, Dealer Sales

Retail Dealer Consignment Agreement
Termination of "Letter No. 1"

We attach a form of termination letter which is to be used when terminating "Letter No. 1," which letter is being given to our retail consignees concurrently with the new Retail Dealer Consignment Agreement.

The letter should be delivered to each dealer by our representative. We should obtain the dealer's acknowledgment of receipt of the termination letter. If any dealer refuses to acknowledge receipt of such termination letter then our representative should witness the time and date that he delivered the same.

The letter of termination should, if possible, be delivered several days in advance of the termination date.

H. D. SEELEY,
Supervisor, Properties &
Records;

By /s/ E. A. McFADDEN.

EAM:tas

Union Oil Company of California

Retail Dealer Consignee,
Address,
City, State.

Dear Sir:

Pursuant to the terms of that certain letter agreement between us, dated ....., 19.., whereby that certain Retail Dealer Consignment Agreement between us, also dated ....., 19.., was amended so that the reference therein to Consignor's posted Dealer Sales tank wagon ex-tax price was deemed to be Consignor's posted tank wagon ex-tax price, and the Commission payment provisions, paragraph 2 of Section Third, of said Retail Dealer Consignment Agreement were changed until such time as said letter agreement was terminated by the undersigned, notice is hereby given that the undersigned intends to, and does hereby cancel and terminate said letter agreement, said cancellation and termination to be and become effective at .... (a.m.) (p.m.) on the ... day of ....., 19...

UNION OIL COMPANY OF CALIFORNIA,

By .....

Dated at ....., ..., 19...

Received ....., 19...

.....,

Consignee.

eam/ndt
4-7-58

Receipt of copy acknowledged.

[Endorsed]: Filed June 5, 1959.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Union Oil Company of California hereby moves, pursuant to R.C.P. Rule 56 for a summary judgment that plaintiff take nothing.

This motion is based on the pleadings, papers and affidavits already on file herein, on the proceedings at pretrial conference, and on the Affidavit of Richard Haas served and filed herewith, including the testimony of plaintiff therein set out, and is made on the ground that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law.

/s/ MOSES LASKY.

[Endorsed]: Filed January 29, 1960.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * *

The pre-trial conference has focused the issues. At the conference of April 30, 1959, the following occurred:

* * *

"Mr. Lasky: I don't stipulate that our failure to give him a new lease was due solely to the fact that he was violating his consignment contract. There were other factors.

* * *

"The Court: Although you may have a second string to your bow, are you willing to eliminate that — * * * to get an answer—this possibility that he may have been unsatisfactory? /p. 31/

* * *

"The Court: * * * Isn't it worth it to just leave that issue out of it entirely? /p. 33/

While defendant did not, at the conference of April 30, 1959, eliminate the "second string from the bow," we now do so for the purpose of this case. We stipulate that the reason defendant did not give plaintiff a new lease was the fact that he violated his consignment contract.

* * *

[Endorsed]: Filed January 29, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD HAAS

State of California,
City and County of San Francisco—ss.

Richard Haas, being first duly sworn, deposes and says:

I am a member of the firm of Brobeck, Phleger & Harrison and one of the attorneys for defendant Union Oil Company of California in this action.

On September 9 and 10, 1959, at Suite 12 of the Hacienda Motel, Fresno, California, I examined plaintiff Richard S. Simpson at an oral deposition pursuant to R.C.P. Rule 30. During the examination there were present, in addition to plaintiff and myself, Maxwell Keith, Esq., counsel for plaintiff, and Gene Pawlick, a shorthand reporter and notary public in and for the County of Fresno, State of California.

During said deposition, the following questions were asked by me and the following answers were given by plaintiff; the following statements were made by Mr. Keith and myself, as the text indicates, and the following proceedings were had:

"Q. Showing, Mr. Simpson, to you a document that has been marked Exhibit 3 for identification, I will ask you if this is your signature on the reverse side? A. Yes.

Q. Showing you what has been marked 4 for

identification, I will ask you if that is your signature on the reverse side?

A. Yes, it is." (Depo. pp. 12, 13.)

* * *

"Q. Showing you what has been marked No. 7 for identification, Mr. Simpson, is that your signature in the lower left-hand corner?

A. Yes." (Depo. p. 14.)

* * *

"Q. Let me show you, Mr. Simpson, a document which is attached to the answer of the Union Oil Company, which I believe to be a picture copy of an agreement, would you look at that? It consists of two pages. Will you look at that and tell me if that is in fact a copy of the consignment agreement that you entered into with the Union Oil Company?

Mr. Keith: Whose affidavit is this?

Mr. Haas: Exhibit A attached to our answer.

A. I believe that to be a true copy.

Mr. Haas: As I recall the pleadings, your pretrial statement stipulated Exhibit A is a true copy of the consignment agreement.

Mr. Keith: That is stipulated, yes, that is right.

A. Yes, that appears to be a true copy of the document that I signed." (Depo. pp. 17, 18.)

* * *

"Q. Now do you have in your possession, Mr. Simpson, copies of any written communications that you made to the Union Oil Company or to any of its officers or agents?

A. I don't recall having made written communications to any of them." (Depo. pp. 18, 19.)

* * *

"Q. Now at one time, Mr. Simpson, you were an employee of the Union Oil Company, were you not?

A. Yes.

Q. And when did that employment begin?

A. I don't remember the exact date. I believe around February of 1948." (Depo. p. 40.)

* * *

"Q. What was your next job with Union after you were resident manager at Pittsburgh?

A. Retail representative at Santa Maria.

Q. Who was your immediate superior when you were retail representative at Santa Maria?

A. Mr. Chapman.

Q. Do you know his initials?

A. I believe it was C. W.

Q. And what was his title down—when you were there?

A. He was the district manager." (Depo. p. 45.)

* * *

"Q. Was this called the Santa Maria area or district or what? A. District.

Q. And you were the one retail representative for that entire district, is that it? A. Yes.

Q. Can you recall, Mr. Simpson, when you started in that position, as near as you can give it to me?

Mr. Keith: He could if he had his employment record to refresh his recollection on that, Mr. Haas.

A. 1955, I believe. Let's see. I don't recall just exactly. It seems though it was about May, 1955, or possibly a little earlier.

Mr. Haas: Well, you went into the Union Oil station here in Fresno as lessee in May of 1956?

A. I think it was just short of a year that I was in Santa Maria.

Q. Approximately how many Union Oil service stations were there in this Santa Maria District?

A. 32, I believe.

Q. And you were the man who called on each?

A. Yes.

Q. Now at the time you were the retail representative in the Santa Maria district was the Union Oil Company entering into consignment agreements with retail service station dealers?

A. Yes." (Depo. pp. 46, 47.)

* * *

"Q. Did you, during the course of your employment as a retail representative in Santa Maria, discuss with any of the service station dealers on whom you called the Union Oil Company retail dealer consignment agreement?

A. Yes.

Q. And I understand you to have already told me that you had a—you had occasion to present these contracts to dealers in your district for their signature? A. That is correct.

Q. And did you at any time while you were employed as a retail representative in Santa Maria explain or attempt to explain to any of the dealers

on whom you called what this consignment agreement was? A. On occasions." (Depo. p. 47.)

* * *

"Q. Well, had you—had anyone from the Union Oil Company told you what the agreement was about? A. Yes.

Q. And who was that?

A. Mr. Chapman." (Depo. p. 51.)

* * *

"Q. And did Mr. Chapman tell you about this agreement before you went out and discussed it with the service station dealers on whom you called?

A. Yes." (Depo. p. 52.)

* * *

"Q. And did he tell you to read the agreement and become familiar with it? A. Yes.

Q. And you did that?

A. Yes, I became pretty familiar with it." (Depo. pp. 52, 53.)

* * *

"Q. By the time you left Santa Maria had all the dealers in your district signed the consignment agreement? A. Yes.

Q. And in each instance you had presented the consignment agreement to them for signature, had you not? A. Yes." (Depo. p. 53.)

* * *

"Q. Now you were discharged by the Union Oil Company, were you not? A. That is correct.

Q. And do you know why? A. Yes.

Q. Well, why were you discharged?

A. Because I had an accident in a company car and was given a 502.

Q. By that you mean drunk driving?

A. That's right.

Q. And you pleaded guilty?

A. I did, on instructions of Mr. Chapman.

Q. And the car was demolished? A. Yes.

Q. And you were let go? A. I was.

Q. When did you first get the idea that you wanted to operate a Union Oil service station?

A. Well, Mr. Chapman was practically on the verge of tears when he told me that Union Oil Company was going to discharge me, and told me that he had discussed it with Mr. Kendall, and that Mr. Kendall had stated that I could have any Union Oil Station in the State of California that was open, if I wanted it." (Depo. pp. 58, 59.)

* * *

"Q. When did you next discuss with a representative of the Union Oil Company the possibility of your leasing a Union station?

A. It was about 10 days after my discharge here in Fresno with Mr. Mealiffe.

Q. I see. How did you happen to come to Fresno to see Mr. Mealiffe?

A. Because I have two brothers who live here, and I decided it would be a better place to settle and place to raise a family." (Depo. p. 59.)

* * *

"Q. And so you came to Fresno and you saw Mr. Mealiffe? A. Yes.

Q. And did you see him in the district office here? A. Yes.

Q. Did you have a conversation with him about leasing a Union service station? A. Yes.

Q. Was anyone present besides the two of you?

A. I think Mr. Pinochi.

Q. Was Mr. Pinochi at that time one of the retail representatives in this area?

A. Yes." (Depo. p. 60.)

* * *

"Q. Would you tell me what you said to Mr. Mealiffe and Mr. Pinochi and what those gentlemen said to you?

A. Well, generally, they explained—I explained the situation what had happened to me, that I had thought that I could do all right in a service station, if they had one that they considered would be a good one in the future, and they told me about Tenth and Ventura. Told me they thought it would be a good service station in the future, both of them considered that I certainly should know how to operate a service station and be very glad to have me as a dealer."

* * *

"Q. And did you at that time tell them that you wanted the station, or did you not say anything, or say you were going to wait?

A. No. Of course I wouldn't have been there if I didn't want it.

Q. Had you seen this station at Tenth and Ventura?

A. Yes, I drove out and looked at it.

Q. Was this after you talked to Mr.——

A. I believe it was before. I think Mr. Pinochi took me out before we talked to Mr. Mealiffe.

Q. I see. And you liked the looks of it?

A. Beautiful service station.

Q. Now when was your—incidentally, is that all you can recall about that conversation with Mr. Pinochi and Mr. Mealiffe, respecting this service station? A. Yes.

Q. When was your next conversation with anyone from the Union Oil Company about the service station?

A. If I recall, I think it was probably a week later, perhaps 10 days. I had to get situated here and then the other dealer we had to talk to, arrangements to be made.

Q. At the time you had your conversation with Mr. Mealiffe then the station had a dealer in it?

A. Yes, it was in operation.

Q. That was Mr. Gregorian? A. Yes.

Q. And you were advised by Mr. Mealiffe that at your first conference that arrangements would have to be made to change dealers?

A. Well, I don't recall that I was specifically advised of that. Of course, a lot was taken as a matter of fact, because they knew that I knew the business, and it probably wasn't the usual procedure that would be taken with a strange dealer going into a service station. There wasn't too much said

along there. It was a matter of whether I wanted it or not, and they themselves had stated they wanted me to take it. It was a matter of whether I wanted it or not, and getting together with the other dealer on buying the equipment.

Q. I see. But it was at that first conversation that you told them that you wanted to have this station?

A. Yes, as nearly as I remember it was the first meeting. I don't remember exactly whether I wanted it or not then, but I believe it was.

Q. Well, did you have any further conversation with Mr. Mealiffe or Mr. Pinochi or with any other representative of the Union Oil Company about this service station before you were actually checked into it?

A. Mr. Pinochi went over the file in the district office with me. I believe that it was that same day.

Q. And in the course of going over the file did he show you its past performance?

A. Yes, so far as the purchases were concerned, that is all. Of course they had it. They did not have the records of actual sales and purchases.

Q. But they showed you the purchases that Gregorian made?

A. By the dealer that went into the service station.

Q. They showed you the volume of gasoline deliveries made to the station and the volume of oil deliveries, so you could get some idea what the performance of the station might be expected to be?

A. That is right." (Depo. pp. 60-63.)

* * *

"Q. Now when you checked in at the service station is that the time that you signed the lease and consignment agreement? A. Yes.

Q. Out at the station? A. Yes.

Q. And who presented these documents to you for signature?

A. Pinochi, as I recall. I don't remember whether Mealiffe was there or not.

Q. And did you have any conversation with Mr. Pinochi about these documents?

A. Well, as I recall our conversation being two retail representatives one to the other, there was some conversation which is such as, 'Do I have to sign this crap?' And so on, and halfway jokingly and knowing that I had to. I mean as near as I can remember that is about what it amounted to." (Depo. p. 64.)

* * *

"Q. Can you recall anything else about that conversation respecting the signing of these papers?

A. No, not especially. It was all cut and dried. I understood it then, and they knew I understood it, as far as that is concerned.

Q. Now was this conversation with Pinochi at the time he checked you into the station the only conversation that you had with him since the day of the meeting in Mr. Mealiffe's office?

A. I don't recall if it was or not.

Q. At least you don't recall any other conversations taking place between those dates?

A. No.

Q. Do you recall any further conversation with Mr. Mealiffe after the meeting in his office up to the time you were checked into the station?

A. No.

Q. Now did you have to have some money to take on this station? A. Yes.

Q. How much did you have to have?

A. I don't recall the exact figure.

Mr. Keith: We have an affidavit on file here in this case showing $3361.

Mr. Haas: I will find the affidavit. Perhaps it will refresh the witness' recollection.

A. As I recall, Union Oil gave me a conditional sales contract for around $1400.

Mr. Haas: That is part of the money you had to borrow from Union, is that correct?

A. On a conditional sales contract.

Q. Under that conditional sales contract did Union sell you certain merchandise you were going to need to operate the station?

A. That is correct. They bought it from Gregorian and resold it to me.

Mr. Haas: I think you are referring, Mr. Keith, to an affidavit the jurat of which is dated October 3, 1958, which recites that, I am quoting now, "In order to lease the service station I was required to spend the amount of $3359.21 for equipment and supplies. I further expended the sum of $396.89 for equipment and necessaries needed in my business as operator of a Union Oil Company station during the two-year period." All that refers to something

else. The investment figure according to this amount, affidavit, is $3359.21.

A. That is a pretty close figure. There were some extras in there that I bought from Mr. Gregorian as much as a week later, and uniforms that I bought from him. An item or two that had been forgotten in the original inventory, I think, amounted to $100 or so.

Q. I see. Is this figure of $3359.21 computed, that is what goes to make up that sum?

A. The inventory and equipment run $3200, as I recall, or thereabouts. Inventory and equipment about $3,200, around that figure somewhere. And then the other was, were things that were purchased from Gregorian that was not on the inventory amounted to the difference there, $150, or whatever it may be." (Depo. pp. 65-67.)

* * *

"Q. Now the inventory and equipment that you say makes up about $3200, when you say inventory, to what do you refer?

A. All types of resale items.

Q. Oil?

A. Oil, fan belts, batteries, tires, radiator caps, oil caps, spark plugs.

Q. But not gasoline?

A. It didn't include gasoline because it was on consignment." (Depo. p. 67.)

* * *

"Q. Did you have any such conversation with Mr. Pinochi in June of 1956?

A. I am sure that during those trips that we discussed the margin, because I almost invariably brought it up.

Q. You wanted a bigger commission, is that it?

A. Yes.

Q. And you told him so?

A. On numerous occasions.

Q. What did he say?

A. Normally just laughed it off. What could he say, he could not increase the commission.

Q. You had read the consignment agreement from Union before you signed it, hadn't you?

A. Yes.

Q. You were fully familiar with it, weren't you?

A. Yes.

Q. You knew at the time you signed the consignment agreement what commission was provided for, did you not? A. Yes." (Depo. p. 81.)

* * *

"Q. Did you at any time that you were the Union dealer, Mr. Simpson, get the idea that the consignment agreement was illegal? A. Yes.

Q. And when was that?

A. I don't recall the exact time.

Q. Well, was it before or after you entered into the second one-year lease?

A. I would say before." (Depo. pp. 127, 128.)

* * *

"Q. * * * From time to time without such an authorization, either written or oral, you were put-

ting prices on the pumps that were not authorized, isn't that so?

A. The times were not numerous. There were times.

Q. There were times. And when you were putting those prices on the pumps, were the prices that you were putting on higher or lower than the prices authorized? A. Both cases.

Q. And were you arriving at those prices that you were putting on the pumps through the exercise of your own business judgment?

A. Yes. (Depo. pp. 145, 146.)

* * *

"Q. Now physically what did you have to do in order to change the prices on your pumps?

A. There is a mechanism which you change the numerals on the pump with.

Q. Is that locked? Do you have to have a key to get into the pumps?

A. It was necessary to have a key to the pump.

Q. And did you have a key?

A. I did." (Depo. pp. 147, 148.)

* * *

"Q. This paragraph 30, Mr. Simpson, of the amended complaint, alleges that in addition to the $1,000 that we talked about heretofore, you suffered damage in the amount of $150,000. Will you tell me, please, how that sum is arrived at, what it represents?

A. It is arrived at by figuring profit for a number of years, if I could, should have been expected to have been in the service station.

Q. How much profit and how many years?

A. It was conservative on both ends. The way it was estimated, in my opinion, $10,000 a year for a period of 15 years.

Q. I see. That is based on your estimate that, your opinion, I should say, first that Union would have leased this service station to you for 15 years?

A. I had no reason to believe they wouldn't when I originally leased it.

Q. And that you would have continued to operate it for 15 years? A. Yes.

Q. And that you would have averaged $10,000 for each of those years as net profit for yourself?

A. That is correct.

Q. Are there any other elements of damage which you claim included in that $150,000 or is that the works?

A. That was to my knowledge, that was it at this time." (Depo. pp. 151, 152.)

* * *

"Q. Now upon receipt of this oral notification by Mr. Campbell followed by the written notice that your lease would not be renewed, did you take any steps to find yourself some other employment or some other occupation or business? A. No.

Q. When did you first start looking around for something else to do.

A. After the termination.

Q. Now by after the termination do you mean after—on the day the second lease expired or after you physically gave up the station.

A. After the injunction expired." (Depo. p. 154.)

* * *

"Q. Did you file with the county any schedule of the personal property that you had so as to enable them to compute what the tax was?

Mr. Keith: I think that is irrelevant and immaterial, instruct the witness not to answer." (Depo. 156.)

* * *

"Q. That is, you are saying that but for some arrangement you had with the Union Oil Company you would have charged during the first year's lease a half a cent a gallon more for gasoline?

A. I may have at times. I am not saying all the time. That of course depends on whether or not the price war is on and whether or not signs are posted.

Q. Well, specifically, Mr. Simpson, on what dates during the first year would you have charged a half a cent a gallon more than you did charge?

Mr. Keith: Our complaint doesn't allege on what particular dates we would have charged more money.

Mr. Haas: I am entitled to find out, I think, how this witness goes about computing his damages.

Mr. Keith: I think it is a presumptious (sic) question. I will instruct the witness not to answer the question." (Depo. pp. 72-73.)

* * *

"Q. During May of 1956 did you wish to charge some price other than—what is it, 35.9 and 31.9?

A. I would like to have established by own price at all times.

Q. Would you answer the question, now, please?

Mr. Keith: That is an answer to that question.

Mr. Haas: Would you read the question?

(Question read.)

Mr. Keith: That answer is a fair answer to that question. Instruct the witness not to answer the pending question." (Depo. p. 74.)

* * *

"Q. Then you would have charged a penny a gallon more for each grade of gasoline than you actually did? A. Possibly.

Q. Well, would you or wouldn't you have?

A. I didn't have the opportunity.

Q. If you had had the opportunity, what would you have done?

A. That is guessing." (Depo. p. 75.)

* * *

"Q. Well, what factors entered into your thinking that you might have charged a penny or maybe two pennies or maybe a half penny more than you actually did charge?

A. There is only one factor that controls that, and that is price war. As long as there is no price signs up, then you can charge for your services.

Q. You mean charge for the gasoline?

A. And service, you also give services, but when you have a price war you can only charge what you have to charge to be competitive or somewheres near, big price signs staring you in the face all over.

Q. Otherwise the customer goes elsewhere, is that the situation?

A. Certainly if there is enough difference, they will, not necessarily for a small amount, but if there is enough difference they will." (Depo. p. 88.)

* * *

"Q. Did you suffer any part of your $1000 alleged damage during the period September 12 to the end of the month of September, 1956?

A. Yes.

Q. And how much was that?

A. It is impossible to get a very true estimate of this because this is when the gas war started.

Q. It is impossible to estimate what your actual loss was during that period, is that it?

A. That is right, to come within any accuracy, because there are so many factors that enter into it." (Depo. p. 89.)

* * *

"Q. How much did you lose as a result during the month of October, 1956?

Mr. Keith: I object to that, to that form of question. We are in an area here of a self-evident and intangible nature. It is not a question of actual dollars and cents.

Mr. Haas: That is all I know that any plaintiff can recover." (Dep. p. 94.)

* * *

"Q. Did you report that fact to Mr. Pinochi?

A. I did.

Q. And did you tell him that you wanted to go up to their premium price?

A. I don't recall having told him that. Still used to maintain at that time that we needed the six-cent margin, and I recall——

Q. Are you talking about net?

A. The profit, net.

Q. What you wanted was a guaranteed eight-cent commission gross on both grades?

A. A net profit of six cents, that would make the eight-cent gross, because they took two cents for rental.

Q. And where did you get that figure, six cents?

A. It came from—again from my estimate of my costs and the help and the operation of the service station and the hours in order for me to only work 10 hours a day instead of 12 or 14, I would have to have that amount of money to hire the help needed." (Depo. pp. 97, 98.)

* * *

"Q. Well, you first, I assume, (sic) if I understand it correctly, that if you hadn't been on consignment, the Union Oil Company would have sold you gasoline that you would have resold?

A. Yes.

Q. Yes. And then you assumed that you would have resold the gasoline at certain prices?

A. Yes.

Q. And then you assumed that you would have sold a certain number of gallons?

A. Yes." (Depo. pp. 121, 122.)

* * *

"Q. You assume that you would have made these additional profits sometimes of a half a cent, sometimes a penny, sometimes a penny and a half, that would have been the increase of margin that you would have had over your commission than what you got in the way you were operating?

A. That is correct.

Q. Right. Now you then had to, did you not, multiply a half a cent in some cases, and a penny in some cases, and a penny and a half in some cases against a certain amount of gallons of gasoline?

A. I could re-do the thing and furnish you with it, if that is what you want.

Q. I would appreciate your doing that, your setting out exactly what you multiply by what to come up with? A. It is an estimate.

Q. I understand that. I am just trying to get straight in my mind what figures you used to estimate this $1000, that is if at a certain time you estimated that house brand you would have made a half a penny or more than you did as a consignee on a certain number of gallons, I would like to know that, can you do that for me?

A. Well, it will not be too hard, because the number of gallons sold we can get an average of the estimate right there of how much per gallon.

Mr. Keith: We will undertake to do that for

you, Mr. Haas; but you will have to have these records, won't you, to do it with?

A. Yes.

Mr. Haas: That is fine. We will just attach this computation to the deposition." (Depo. pp. 125, 126.)

* * *

Thereafter, Maxwell Keith, Esquire, delivered to me three computations, a true copy of each of which is attached hereto.

"Q. Now you have brought with you, as I understand it, the business records that you maintained which reflect your operation of the Union Oil Service Station of which you were formerly a lessee.

A. Yes, they are there." (Depo. p. 19.)

* * *

"(Offers received and marked Defendant's Exhibits 14-A through 14-W inclusive for identification.)

Q. Mr. Simpson, are the files that have been marked with the No. 14, and these alphabetical designations -A to -W, the business records that you maintained reflecting the operations of the Union Oil Service Station of which you were formerly a lessee for the period May, 1956 to April, through April, 1958? A. Yes." (Depo. p. 21.)

* * *

"Mr. Haas: The folders containing the business records of the Union Oil Company service station

for the period May, 1956 through April, 1958, should be 15-A through -W and not 14-A through -W. We already have an Exhibit -W.

(Documents identified as Exhibits 14-A through 14-W corrected to read 15-A through 15-W.)" (Depo. p. 31.)

* * *

"Q. Have you brought with you, Mr. Simpson, the business records that you have relating to the General Petroleum station of which you are now the lessee? A. Yes." (Depo. p. 37.)

* * *

"(Offers received and marked Defendant's Exhibits 21-A through 21-M, inclusive, for identification.)

Q. Showing you the file, Mr. Simpson, that has been marked 21-A, can you tell me what was the first day on which you operated the Mobil Oil Station, the records of which are marked 21?

A. July 3, 1958 was the first day of business.

Q. And your last day in the Union Oil Station was June 5, 1958, was it not? A. Correct.

Q. Now who is the Bill referred to on the cover of 21-A? A. He is my partner.

Q. What is his full name?

A. Spears, S-p-e-a-r-s.

Q. And what is the arrangement between you two gentlemen?

A. It is a fifty-fifty partnership." (Depo. p. 38.)

* * *

I have personally examined the monthly financial records produced by plaintiff and covering plaintiff's operation during the period May 23, 1956, through April 30, 1958, of the service station formerly leased to plaintiff by defendant. Said records show the following quantities of gasoline sold from said station, and the following net profits realized by plaintiff from the operation of said service station:

Month	Exhibit No.	Gasoline Sold (Gallons)	Net Profit
May 23-31, 1956	15-A	3,069	$ -335.07
June, 1956	15-B	12,619	499.62
July, 1956	15-C	13,109	259.34
August, 1956	15-D	13,429	542.31
September, 1956	15-E	12,852	498.34
October, 1956	15-F	12,980	431,000
November, 1956	15-G	12,439	341.26
December, 1956	15-H	12,415	353.50
January, 1957	15-I	11,580	524.14
February, 1957	15-J	9,915	645.84
March, 1957	15-K	11,496	344.25
April, 1957	15-L	11,142	472.82
May, 1957	15-M	12,353	603.41
June, 1957	15-N	15,970	865.00
July, 1957	15-O	17,856	853.32
August, 1957	15-P	18,529	708.24
September, 1957	15-Q	15,005	224.52
October, 1957	15-R	14,756	532.85
November, 1957	15-S	10,019	542.93
December, 1957	15-T	11,023	494.18
January, 1958	15-U	9,353	450.36
February, 1958	15-V	8,166	254.51
March, 1958	15-W	11,164	266.54
April, 1958	No number	10,045	180.65

I have personally examined the monthly financial records produced by plaintiff and covering plain-

tiff's operation, during the period July 3, 1958 through July 31, 1959, of the service station leased to plaintiff by General Petroleum Corporation. Said records show the following quantities of gasoline sold from said station, and the following net profits realized by plaintiff and his partner from the operation of said service station.

Month	Exhibit No.	Gasoline Sold (Gallons)	Net Profit
July, 1958	21-A	12,238	$ 609.38
August, 1958	21-B	13,318	1,130.28
September, 1958	21-C	12,736	922.48
October, 1958	21-D	14,574	1,009.17
November, 1958	21-E	14,438	1,085.56
December, 1958	21-F	15,861	790.71
January, 1959	21-G	15,923	901.06
February, 1959	21-H	14,934	809.46
March, 1959	21-I	15,968	1,102.47
April, 1959	21-J	15,747	1,114.85
May, 1959	21-K	15,950	1,214.69
June, 1959	21-L	15,451	1,228.33
July, 1959	21-M	16,517	1,309.38

/s/ RICHARD HAAS.

Subscribed and sworn to before me this 29th day of January, 1960.

[Seal] /s/ MAUDE W. NASH,
Notary Public in the City and County of San Francisco, State of California.

My Commission expires October 14, 1962.

Six Cent Minimum Method

Period May 23, 1956 through Sept. 11, 1956

Gallons of gasoline pumped:

Premium	27,186 gal.	
Regular	20,000 "	47,186 gal.
Actual Net Margin	.054¢ both grades	
Minimum Margin Needed to operate profitably	.06 ¢	
Difference	.006¢	
Net Loss		$ 283.12

Period Sept. 12, 1956—one day only

Gallons of gasoline pumped:

						Loss
Premium	282 gal.	Act. Margin	.056¢	Diff.	.004	$ 1.13
Regular	293 "	" "	.046	"	.014	$ 4.00
Net Loss						$ 5.13

Period Sept. 13, 1956—Nov. 20, 1956

Gallons of gasoline pumped:

						Loss
Premium	15,315 gal.	Act. Margin	.051¢	Diff.	.009	$137.84
Regular	13,165 "	" "	.046	"	.019	$184.31
Net Loss						$ 322.15

Period Nov. 20, 1956—Nov. 27, 1956

Gallons of gasoline pumped:

						Loss
Premium	1,885 gal.	Act. Margin	.054¢	Diff.	.006	$ 11.31
Regular	1,365 "	" "	.054	"	.006	$ 8.19
Net Loss						$ 19.50

Period Nov. 27, 1956—Jan. 3, 1957

Actual Net Margin at minimum .06¢

Period Jan. 3, 1957—Jan. 18, 1957

Gallons of gasoline pumped:

						Loss
Premium	2,887 gal.	Act. Margin	.054¢	Diff.	.006	$ 17.32
Regular	2,589 "	" "	.054	"	.006	$ 15.53
		Net Loss				$ 32.85

Period Nov. 18, 1957 to Feb. 27, 1957

Gallons of gasoline pumped:

						Loss
Premium	7,886 gal.	Act. Margin	.059¢	Diff.	.001	$ 7.89
Regular	6,857 "	" "	.059	"	.001	6.86
		Net Loss				$ 14.75

Period Feb. 27, 1957—Mar. 30, 1957

Gallons of gasoline pumped:

						Loss
Premium	6,236 gal.	Act. Margin	.051¢	Diff.	.009	$ 56.12
Regular	5,050 "	" "	.046	"	.014	70.70
		Net Loss				$ 126.82

Period Mar. 31, 1957—Feb. 28, 1958

During this period my margin slightly over minimum of .06¢

Premium	.062 to .065
Regular	.064 to .067

Period Mar. 1, 1958—Mar. 7, 1958

Gallons of gasoline pumped:

						Loss
Premium	1,269 gal.	Act. Margin	.051¢	Diff.	.009	$ 11.42
Regular	1,145 "	" "	.046¢	"	.014	16.03
		Net Loss				$ 27.45

Period Mar. 8, 1958—Mar. 12, 1958

Gallons of gasoline pumped:

						Loss
Premium	803 gal.	Act. Margin	.081¢	Diff.	.....	$ .....
Regular	600 "	" "	.046	"	.014	8.40
		Net Loss				$ 8.40

Period Mar. 12, 1958—Mar. 19, 1958

Gallons of gasoline pumped:

Premium	Act. Margin	.069¢	Diff.	.....	.....
Regular	" "	.064	"	___	___

(Over Minimum this period)

Period Mar. 20, 1958—Apr. 30, 1958

Gallons of gasoline pumped:

						Loss
Premium	6,956 gal.	Act. Margin	.051¢	Diff.	.009	$ 62.60
Regular	7,012 "	" "	.046	"	.014	98.17
		Net Loss				$ 160.77
		Total Net Loss				$1,000.94

Period May 1, 1958 through occupancy June 6, 1958 not included because of lack of records available. There would be further loss for that period.

Gallons pumped and actual margins taken from records.

Supposing I Could Have Increased My Margin ½¢ Premium and 1¢ Regular

Period		Gal. Pumped	Actual Margin	Margin Possible	Loss
May 23, 1956	Premium	27,186	.054 + ½¢	.059	$ 135.93
Sept. 11, 1956	Regular	20,000	.054 + 1¢	.064	200.00
					$ 335.93
Sept. 12, 1956 only	Premium	282	.056 + ½¢	.061	$ 1.41
	Regular	293	.046 + 1¢	.056	2.93
					$ 4.34
Sept. 13, 1956	Premium	15,315	.051 + ½¢	.056	$ 76.57
Nov. 20, 1956	Regular	13,165	.046 + 1¢	.056	131.65
					$ 208.22
Nov. 20, 1956	Premium	1,885	.054 + ½¢	.059	$ 9.43
Nov. 27, 1956	Regular	1,365	.054 + 1¢	.059	13.65
					$ 23.08

Period		Gal. Pumped	Actual Margin	Margin Possible	Loss
Nov. 27, 1956	Premium	8,015	.06 + ½¢	.065	$ 40.08
Jan. 3, 1957	Regular	6,366	.06 + 1¢	.07	63.66
					$ 103.74
Jan. 3, 1957	Premium	2,887	.054 + ½¢	.059	$ 14.44
Jan. 18, 1957	Regular	2,589	.054 + 1¢	.064	25.89
					$ 40.33
Jan. 18, 1957	Premium	7,886	.059 + ½¢	.064	$ 39.43
Feb. 27, 1957	Regular	6,857	.059 + 1¢	.069	68.57
					$ 108.00
Feb. 27, 1957	Premium	6,236	.051 + ½¢	.061	$ 31.18
Mar. 30, 1957	Regular	5,050	.046 + 1¢	.056	50.50
					$ 81.68
Mar. 31, 1957	Premium)	Margin adequate through			
Feb. 28, 1958	Regular)	this period			
Mar. 1, 1958	Premium	1,269	.051 + ½¢	.056	$ 6.35
Mar. 7, 1958	Regular	1,145	.046 + 1¢	.056	11.45
					$ 17.80
Mar. 8, 1958	Premium	Margin adequate			$
Mar. 12, 1958	Regular	600	.046 + 1¢	.056	6.00
					$ 6.00
Mar. 12, 1958	Premium)	Margin			
Mar. 19, 1958	Regular)	Adequate			
Mar. 20, 1958	Premium	6,956	.051 + ½¢	.056	$ 34.78
Apr. 30, 1958	Regular	7,012	.046 + 1¢	.056	70.12
					$ 104.90
		Total Net Loss			$1,034.92

Gallons pumped taken from records.
Margins (Actual) taken from records.

Supposing I Could Have Increased Margin 1¢ Premium and 2¢ Regular

Period		Gal. Pumped	Actual Margin	Margin Possible	Loss
May 23, 1956	Premium	27,186	.054 + 1¢	.064	$ 271.86
Sept. 11, 1956	Regular	20,000	.054 + 2¢	.074	400.00
					$ 671.86
Sept. 12, 1956	Premium	282	.056 + 1¢	.066	$ 2.82
Only	Regular	293	.046 + 2¢	.066	5.86
					$ 8.68
Sept. 13, 1956	Premium	15,315	.051 + 1¢	.061	$ 153.15
Nov. 20, 1956	Regular	13,165	.046 + 2¢	.066	263.30
					$ 416.45
Nov. 20, 1956	Premium	1,885	.054 + 1¢	.064	$ 18.85
Nov. 27, 1956	Regular	1,365	.054 + 2¢	.074	27.30
					$ 46.15
Nov. 27, 1956	Premium	8,015	.06 + 1¢	.07	$ 80.15
Jan. 3, 1957	Regular	6,366	.06 + 2¢	.08	127.32
					$ 207.47
Jan. 3, 1957	Premium	2,887	.054 + 1¢	.064	$ 28.87
Jan. 18, 1957	Regular	2,589	.054 + 2¢	.074	51.78
					$ 80.65
Jan. 18, 1957	Premium	7,886	.059 + 1¢	.069	$ 78.86
Feb. 27, 1957	Regular	6,857	.059 + 2¢	.079	137.14
					$ 216.00
Feb. 27, 1957	Premium	6,236	.051 + 1¢	.061	$ 62.36
Mar. 30, 1957	Regular	5,050	.046 + 2¢	.066	101.00
					$ 163.36

Period		Gal. Pumped	Actual Margin	Margin Possible	Loss
Mar. 31, 1957	Premium)	Margin			
Feb. 28, 1958	Regular)	Adequate			
Mar. 1, 1958	Premium	1,269	.051 + 1¢	.061	$ 12.69
Mar. 7, 1958	Regular	1,145	.046 + 2¢	.066	22.90
					$ 35.59
Mar. 8, 1958	Premium	Margin Adequate			
Mar. 12, 1958	Regular	600	.046 + 2¢	.066	$ 12.00
					$ 12.00
Mar. 12, 1958	Premium)	Margin			
Mar. 19, 1958	Regular)	Adequate			
Mar. 20, 1958	Premium	6,956	.051 + 1¢	.071	$ 69.56
Apr. 30, 1958	Regular	7,012	.046 + 2¢	.066	140.24
					$ 209.80
			Total Net Loss		$2,068.01

Gallons and Actual Margins taken from records.

May and 6 days of June missing.

[Endorsed]: Filed January 29, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF MOSES LASKY

State of California,
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and says:

I am a member of the firm of Brobeck, Phleger & Harrison and one of the attorneys for defendant

Union Oil Company of California, in this action.

I was one of the attorneys for said Union Oil Company of California in United States v. Standard Oil Company of California, et al., Civil No. 11584-C in the United States District Court for the Southern District of California.

On or about June 20, 1959, I received from George B. Haddock, Esquire, counsel in direct charge for the Government of said proceedings in the District Court for the Southern District of California, a letter reading in words and figures as follows:

"Antitrust Division,
1602 U.S. Post Office and Court House,
Los Angeles 12, California.

June 19, 1959

60-57-35.

Moses Lasky, Esquire,
Brobeck, Phleger & Harrison,
111 Sutter Street,
San Francisco 4, California.

Dear Mr. Lasky:

Reference is made to your letter of June 11 in which you ask for an expression of opinion from the Antitrust Division as to the effect of Section XI of the Final Judgment in United States v. Standard Oil Company of California, et al., Civil No. 11584-C, upon the right of a defendant consignor to determine the prices at which its consigned products should be sold by a consignee.

I have been authorized to advise you, on behalf of the Antitrust Division, that the reference in Section XI to resellers embodies a definition of that term in subsection (n) of Section II and that Section XI therefore does not relate to consigned products or to consignees insofar as consigned products are concerned.

Sincerely yours,

ROBERT A. BICKS,
Acting Assistant Attorney General;

By GEO. B. HADDOCK,
Attorney, Department of Justice."

/s/ MOSES LASKY.

Subscribed and sworn to before me this 29th day of January, 1960.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires October 14th, 1962.

[Endorsed]: Filed January 29, 1960.

[Title of District Court and Cause.]

STATEMENT OF DEFENDANT PURSUANT TO PROCEEDINGS OF JANUARY 20, 1960

Plaintiff having filed, on January 11, 1960, "Plaintiff's Motion for Production of Documents, Answers to Interrogatories and Trial Setting," and the Court after hearing said motion on January 20, 1960, having ruled that defendant should furnish certain information to plaintiff, the following is hereby filed in conformity with said proceedings; defendant reserving, however, all objections respecting the relevance, competence and materiality of said facts:

1. The number of retail outlets supplied with gasoline by defendant, and the number of the various types of such outlets, vary from time to time. The figures hereinafter set out are fairly representative of these facts during the period May 23, 1956, to May 22, 1958.

As of December 31, 1957, defendant supplied gasoline to retail outlets as follows:

California	2377	Utah	29
Washington	690	Idaho	58
Oregon	532	Alaska	69
Nevada	92	Hawaii	95
Arizona	205	North Dakota	3
Montana	150	Wyoming	8

As of December 31, 1957, each of the foregoing outlets was operated either: (a) for training and experimental purposes by salaried employees of de-

fendant, hereafter referred to as "company operated"; (b) by dealers who leased or subleased the outlets from defendant hereafter referred to as "lessee-dealers"; or (c) by dealers who either owned the outlets or leased them from third persons hereafter referred to as "non-lessee dealers." The breakdown of these categories is by States as follows:

	Company Operated	Lessee Dealers	Non-Lessee Dealers
California	12	1335	1030
Washington	2	254	434
Oregon	0	204	328
Nevada	0	35	57
Arizona	0	106	99
Montana	0	34	116
Utah	0	11	18
Idaho	0	24	34
Alaska	0	16	53
Hawaii	0	51	84
North Dakota	0	1	2
Wyoming	0	4	4

The said company operated stations were located in Los Angeles (5), Beverly Hills (2), Pasadena (2), Lakewood (1), Anaheim (1), San Francisco (1) and Seattle (2).

As of December 31, 1957, each of the foregoing outlets operated by dealers received gasoline from defendant either by purchase or as a consignee pursuant to a Retail Dealer Consignment Agreement in the form of Exhibit A to the Answer of Defendant. The breakdown of these categories by States is as follows:

	Lessee-Dealers		Non-Lessee Dealers	
	Purchasers	Consignees	Purchasers	Consignees
California	3	1332	234	796
Washington	1	253	245	189
Oregon	2	202	86	242
Nevada	3	32	23	34
Arizona	3	103	59	40
Montana	8	26	97	19
Utah	3	8	17	1
Idaho	2	22	28	6
Alaska	16	0	53	0
Hawaii	51	0	44	0
North Dakota	0	1	2	0
Wyoming	4	0	4	0

2. The amount of gasoline delivered by defendant to retail outlets in the several categories and in the several areas where defendant does business varies from time to time. If the figures hereinafter set out were doubled, they would be fairly representative of the total quantity of gasoline delivered by defendant during the entire two-year period, May 23, 1956 to May 22, 1958.

During the calendar year 1957, defendant delivered to the foregoing outlets for sale at retail the following amounts of gasoline, in gallons:

	Company Operated	Lessee Dealers	Non-Lessee Dealers
California	7,218,028	326,440,042	59,047,037
Washington	370,445	40,549,976	11,563,010
Oregon	0	28,449,473	9,120,229
Nevada	0	8,967,606	2,053,591
Arizona	0	16,969,102	2,786,177
Montana	0	3,365,864	5,242,848

Utah	0	964,541	10,980
Idaho	0	1,821,013	721,020
Alaska	0	2,661,303	3,003,820
Hawaii	0	12,435,902	9,348,543
North Dakota	0	180,504	319,728
Wyoming	0	180,960	79,954

3. During the period May 23, 1956 to May 22, 1958, the average number of Retail Representatives employed by defendant at any one time was approximately 100.

4. The names of the independant refiners and distributors, and the business addresses thereof as appearing on defendant's records, to whom defendant sold unbranded gasoline from its California refineries during the period May 23, 1956 to May 22, 1958, in quantities aggregating as much as 250,000 gallons in any six-month period are as follows:

Bankline Oil Company,
437 South Hill St., Los Angeles, Calif.

Caminol Company,
525 W. Third St., Hanford, Calif.

Century Oil Company,
2345 E. 28th St., Long Beach, Calif.

Douglas Oil Company of California,
P.O. Box 697, Paramount, Calif.

K. D. Ford Petroleum Company,
P.O. Box 766, Santa Maria, Calif.

Hancock Oil Company,
2828 Junipero Ave., Long Beach, Calif.

Imperial Oil Co., Ltd.,
1090 Granville St., Vancouver, B. C., Canada.

Manespo Refining Company,
P.O. Box 7172, Long Beach, Calif.

Signal Oil & Gas Company,
811 W. 7th St., Los Angeles, Calif.

Sunland Refining Company,
East 7 California Ave., Fresno, Calif.

Sunset International Petroleum Corp.,
3450 Wilshire Blvd., Los Angeles, Calif.

Texas City Refining Co., Inc.,
P.O. Box 1271, Texas City, Texas.

Time Oil Company,
2221 So. Olive St., Los Angeles, Calif.

Wilshire Oil Company,
727 W. 7th St., Los Angeles, Calif.

The records of defendant indicate that some of the unbranded gasoline sold by defendant to Hancock Oil Company was for delivery to Sunland Refining Company in Fresno, and that some of the unbranded gasoline sold by defendant to Sunland Refining Company was for delivery in Fresno, California.

5. During the period May 23, 1956 to May 22, 1958, defendant delivered gasoline in California to one "split pump" retail outlet, i.e., an outlet where one or more pumps bore the colors and trade-marks of defendant and one or more other pumps bore

the colors and trade-marks of some other person. Said outlet was the Ramona Garage, located in Sacramento, California.

Dated: February 9, 1960.

/s/ MOSES LASKY,

/s/ RICHARD HAAS,

BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant, Union Oil Company of California.

Duly verified.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 12, 1960.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF VIOLATION OF THE ANTITRUST LAWS

Plaintiff Richard S. Simpson, hereby moves, pursuant to F.R.C.P. Rule 56 for Partial Summary Judgment on the issue of violation of the antitrust laws, that the defendant's Retail Dealer Consignment Program is in restraint of trade and thereby is in violation of Sections 1 and 2 of the Sherman Act.

This motion is based on the pleadings, papers, affidavits on file herein, on the proceedings at Pre-Trial Conferences, the stipulations of defendant and on the depositions taken in the action, and is made on the ground that Union Oil Company's Retail Dealer Consignment Agreement program is direct resale price fixing which is per se in restraint of trade as a matter of law under applicable decisions of the United States Supreme Court.

By this motion plaintiff does not waive its request for a trial by jury and requests that the issue of damages be set by the Court for trial.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

NOTICE OF MOTION

To: Defendant above named, and to its attorneys Moses Lasky, Richard Haas, Brobeck, Phleger & Harrison:

Please take notice that on Thursday, July 28, 1960, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, plaintiff will bring on the foregoing motion for hearing before the Honorable Lloyd H. Burke, Judge of the above-entitled Court, Seventh and Mission Streets, San Francisco, California.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

[Endorsed]: Filed July 20, 1960.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF VIOLATION OF THE ANTITRUST LAWS

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* * *

Deposition of W. S. Christopher, Division Manager, Retail Marketing, Union Oil Company, pps. 34 to 36:

"A. Well, I can't recall any specific items, as such. We were given the logic of the program.

Q. What was the logic of the program, Mr. Christopher?

A. That the retail consignment program would put the Union Oil Company in a position of being able to keep its dealers competitive in retail prices in the field.

Q. Excuse me?

A. By placing our gasoline in the tanks, nominating the retail price at which it would be sold, and paying the retail consignee a stated commission for the performance of that operation.

Q. I believe you testified that prior to this time that—or the conversation was that you were changing the program. What kind of a program did you have before the retail dealer consignment program?

A. Purchase and sale program.

Q. Will you describe the purchase and sale program?

A. We deliver gasoline to a dealer, bill the same,

and whether he paid for it or not he, in effect, took title to it.

Q. What basis did you bill the retailer?

A. We had two methods, three methods, depending upon the volume of the storage for gasoline that the dealer had. We operated large equipment, and if the dealer could take a full—what we call transport delivery, he would—he was expected to purchase on that basis and receive a certain discount for that.

If he had small tanks and this was unprofitable, out of the way, or difficult, or unsafe to operate this large equipment into the area, we called on our local wholesale consignee to make the deliveries. They delivered in such quantities as the reseller might want.

Q. Did you charge the retailer on the basis of a tank wagon price?

A. That was the basis of computation for price.

Q. Who determines those tank wagon prices?

A. That I don't know.

Q. They were determined by Union Oil Company?

A. They were not—oh, yes, by our company.

Q. You would request the retailer to pay you a certain tank wagon price for the gasoline, is that not correct? A. Yes.

Q. Did you attempt to control the retailer's price under this prior purchase and sale program that you have outlined?

"Mr. Haas: Are you talking now, Mr. Keith, before Fair Trade again?

Mr. Keith: I am not talking about anything.

I'm talking about did he attempt to control—did Union Oil Company to his knowledge attempt to control the retail price of gasoline?

The Witness: No, we didn't.

Q. (By Mr. Keith): In this purchase and sale program? A. No; we didn't.

Q. Was a retailer free to establish his own retail price under this prior purchase and sale program, to your knowledge? A. Completely.

Q. Would it be fair to say that the effect of the retail dealer consignment program was to control the retail price of gasoline by the dealer?

Mr. Haas: I'll object to that question as calling for the conclusion of the witness; what the retail dealer consignment agreement is between Mr. Simpson and Union Oil Company is a matter of record in this case. What Mr. Christopher——

Mr. Keith: I believe——

Mr. Haas: A characterization of a complex legal document.

Mr. Keith: I'll withdraw the question.

Mr. Haas: Very well.

Q. (By Mr. Keith): Were you told by Mr. Rath in this meeting under the retail dealer program Union Oil would be attempting to set the retail price of gasoline to be charged by the retailer?

A. Yes, but perhaps not in those direct words.

Q. Well, could you recall the exact words?

A. Yes; we would nominate the retail price at which it would be sold, in line with what was being sold competitively in those areas or in individual areas.

Q. Did he tell you how Union Oil Company would go about setting the retail price?

A. Yes.

Q. What did he say?

A. In essence, we were to keep constant watch on the activities of our principal competitors, record the conditions of the prices, and then if the majority of our principal competitors were at a price lower than we were, then we would establish a price which was competitive with them.

Q. Did he define the "principal competitors"?

A. Yes; the major companies.

"Q. That would be who?

A. Shell, Standard, Tidewater, Richfield—Tidewater Associated, General Petroleum—there are six; did I name six?

Mr. Haas: Do you mean, Mr. Christopher, to include the Texas Company?

The Witness: Yes, if I missed it, Texas, yes."

* * *

(3) The effect of the Retail Dealer Consignment Program was to require 3,000 otherwise competitive independent businessmen to fix a non-competitive price at the levels of 1c or more over the major competitors of Union which eliminated competition between Union Oil dealers and between them and competitive dealers of major oil companies.

The record is undisputed that defendant attempted to establish a uniform price on all of its consignment dealers. Thus Union Oil Company

promulgated a uniform price fixing combination in interstate commerce. The price fixing combination not only limited price competition between Union Oil retail dealers but between them and competitive retail gasoline dealers.

* * *

[Endorsed]: Filed July 20, 1960.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Defendant moved for summary judgment and plaintiff filed a cross-motion for partial summary judgment on the issue of violation of antitrust laws. Extensive pretrial proceedings before this court have eliminated all the factual disputes and defendant has stipulated to certain specific allegations of fact to facilitate disposition of this case on reciprocal motions for summary judgment. After oral argument the matter was submitted on briefs and the existing record.

The basic facts as indicated by the pleadings and in hearings before this court are uncomplicated. Defendant Union Oil Company leases or owns parcels of land on which gasoline service stations have been constructed. At the time in issue, such service stations in California and other Western states were leased by defendant to independent operators on a yearly basis. Concurrent with the lease, Union and its various lessees executed a retail dealer con-

signment agreement, terminable by either party at stipulated times, and ceasing in any event upon termination of the lessee's right to occupy Union's service station. The terms of the consignment agreement bound the lessee-consignee to sell Union's gasoline at such prices as Union would authorize.

Plaintiff, a former employee of defendant, leased a service station of defendant's located in Fresno on May 23, 1956. A one year lease and a retail dealer consignment agreement for the same period of time was entered into between the parties. In 1957 Union gave plaintiff a new one year lease which terminated on May 22, 1958. In April of 1958 Union notified plaintiff that it was terminating the consignment agreement and no offer to renew the lease would be made.

On May 21, 1958, plaintiff brought this action charging price fixing and seeking to enjoin defendant from taking possession of the service station and from leasing it to anyone else. The relief requested was denied by another Judge of this court on June 3, 1958, 162 F. Supp. 746. There was a finding that the lease had expired and the court refused to compel the making of a new lease. Since plaintiff's contractual relationship had terminated he was held to have no standing in attempted enforcement of antitrust laws on behalf of those who might be aggrieved by alleged price fixing contracts. Union subsequently brought an action for unlawful detainer in the state court and obtained judgment giving it possession of the service station. Plaintiff

surrendered possession in compliance with the state court adjudication.

Plaintiff amended his complaint and demanded damages instead of mandatory grant of a new lease. Union filed a motion for summary judgment, which was denied by the late District Judge Murphy "without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion may be based." Extensive discovery since the hearing before Judge Murphy has sharpened the issues to such extent as to allow this court to entertain reciprocal motions for summary judgment.

The fundamental issue in the instant action is the legality of Union's method of marketing gasoline by use of retail dealer consignment agreements. Plaintiff contends that the agreement is unlawful on its face as a matter of law. Defendant maintains that it does not violate antitrust law by requiring the consignee dealer to sell branded gasoline at prices determined by Union. For purposes of this motion Union has stipulated that it leases stations only to consignees and plaintiff's failure to comply with prices fixed by Union pursuant to the consignment agreement was the reason why he was not offered a new lease of the Fresno service station. (Defendant's memorandum in support of motion for summary judgment, p. 11; January 29, 1960.)

The pertinent terms of the consignment agreement, a copy of which is in evidence, expressly provide that Union retains title to the gasoline de-

livered to the consignee until sale by the latter (Paragraph 4); that the consignee agrees to sell the gasoline at prices authorized by the consignor (Paragraph 2); and that he is entitled only to a commission computed pursuant to a formula set out in the agreement (Paragraph 3).

Plaintiff concedes that he was familiar with defendant's method of supplying gasoline at the time he entered into the lease for the service station at Fresno and that he knew Union would not sell gasoline to him as an independent retail dealer. He knew that gasoline was to be furnished only pursuant to the consignment agreement and that he would be required to sell the gasoline at prices authorized by Union. (Affidavit of plaintiff filed October 15, 1958). He contends, however, that he was entitled to disregard the latter provision, because the consignment agreement violated the antitrust laws.

The alleged violation is predicated upon the theory that Union's consignment program results in the fixing of prices charged by independent retail gasoline dealers who would otherwise exercise their own judgment as to such prices. Plaintiff has also endeavored to inject the contention that the agreement constituted an attempt to monopolize and that conspiracy is an issue in the instant proceeding. However, the record indicates that plaintiff's case rests solely on the contention that the retail dealer consignment agreement as such, violates the Sherman Act.

Defendant contends that the consignment method of selling could not amount to price fixing since Union merely determined the price at which its own product was to be sold by consignees. Union does not argue that it can legally fix a price at which a purchaser may resell a product, but maintains that under a consignment contract it is entitled to fix a price at which the dealer can sell gasoline held on consignment. Defendant argues that a consignment dealer is not "a reseller" of defendant's product, but acts only in the capacity of defendant's agent or factor. It maintains that the status of an independent business man, as lessee of a service station, is not inconsistent with existence of limited authority as a factor selling defendant's gasoline.

Plaintiff contends that notwithstanding the language of the agreement, Union's consignees must be accepted as retail sellers and not agents who sell defendant's gasoline to the public. He further maintains that even if they were considered consignees the agreement is void since its purpose and effect is to allow Union to maintain non-competitive prices and thus engage in a price fixing combination. Plaintiff also alleges that the consignment agreement was not freely entered into by the consignees since they were not able to get defendant's product on another basis and that enforcement was effected by the termination of the lease of consignees who failed to charge the prices which Union authorized. In essence, plaintiff argues that the consignment agree-

ment is a device to allow defendant to fix the retail price of gasoline and constitutes a method of selling amounting to price fixing, thus violating the anti-trust laws.

It is established law that several sellers may not conspire together to set their prices and, except where permitted by fair-trade laws, a supplier may not fix a price at which a purchaser from it may resell the product bought. Defendant contends that the instant situation is outside these proscriptions because Union did not make an outright sale of the gasoline supplied to the plaintiff. Union argues that the alleged fixing of a resale price is factually impossible in view of the terms of the consignment agreement which provided that Union retained title to the gasoline until sold by the plaintiff. Defendant defines the status of the service station operator as that of factor or commission merchant who sells defendant's gasoline on commission at prices stipulated by Union as the consignor. The contract in question was entered into in California and defendant contends that the consignee was under a duty to adhere to the price schedule as part of the instructions of the principal relevant to the sale of the latter's goods, California Civil Code §2027.

Plaintiff contends that the retail lessee dealers cannot be regarded as agents, factors or consignees, and that their assumption of all the risks and obligations of a businessman is proof that the instant situation does not differ from that considered in United States v. Richfield Oil Corp., 99 F. Supp.

280, affirmed 343 U. S. 922. He labels the consignment agreement a subterfuge designed to control prices in a price war or over-supplied market, rather than a means of transferring risks between defendant and its dealers.

Defendant, citing cases, contends that the sale of gasoline by the consignment method had been commonplace in the petroleum business for decades and that the Antitrust Division approved this method when seeking to remedy the "evils" of the oil industry in United States v. Standard Oil Company of California, Civil No. 115854-C (S. D. Cal.). Defendant denies that United States v. Standard Oil, 337 U. S. 293, and United States v. Richfield Oil Corp., 99 F. Supp. 280, affirmed 343 U. S. 922, are applicable to the instant case, since they involved service station operators who bought and then resold gasoline. It is defendant's argument that the consignment element constitutes a radically different relationship from that of a sale and points to plaintiff's admission that he was paid on a consignment commission basis as proof that the gasoline dispensed by him was Union's gasoline and not his own.

Plaintiff urges upon this court that the holding in United States v. Parke, Davis & Co., 362 U. S. 29, and the decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, compels the conclusion that a written consignment or agency agreement fixing prices on substantially all retailers is void without more. The cases in question do not

substantiate such sweeping conclusions and are distinguishable on their facts from the instant situation. It would be error to read Dr. Miles as holding consignment arrangements, as such, to be illegal where the consignor limits the consignee's authority to fix prices independently. Dr. Miles involved sales by the manufacturer to the dealer and resale by the latter and found illegal a system of interlocking restrictions designed not merely to control the prices at which the agent sold the product, but the prices for all sales, wholesale or retail to purchasers or subpurchasers.

Parke, Davis was a conspiracy case in which the government sought to enjoin the defendant from maintaining control over the wholesale and retail price of its product. Plaintiff has conceded that the instant case involved the activities of a single defendant and that it is not a conspiracy action.

It must be noted that Parke, Davis dealt with outright sales and that Dr. Miles dealt with a situation involving a combination of consignment and outright sale. Parke, Davis expressly recognizes that a manufacturer may refuse to conduct business with one who fails to sell at prices suggested by the manufacturer and that he may so inform the buyer. It would seem illogical to deny such a right to a manufacturer who does not sell his product outright, but merely consigns it. Union's marketing method does not fall within the Parke, Davis or Dr. Miles category and the legality of the consignment agreement is not affected by those decisions.

Plaintiff's admission that he was paid on a consignment commission basis leaves little doubt that a genuine consignment agreement was in force.

Plaintiff has conceded that "monopoly," as such, is not an issue in this case, but argues that combined use of the lease and consignment agreement subjects Union to such a charge. Union's power, as the manufacturer, over its trade-marked product "is not the power that makes an illegal monopoly." United States v. E. I. DuPont DeNemours & Co., 351 U. S. 377 at 393. And likewise, Union's refusal to offer plaintiff a new lease cannot be termed an attempt to monopolize. Alexander v. Texas Co., 149 F. Supp. 37 at 44. Plaintiff has failed to show that the combination of lease and consignment agreement constitutes a monopoly.

This court is presently concerned only with the legality of the consignment agreement and ventures no opinion as to the propriety of defendant's merchandising methods. Plaintiff has presented no grounds which would substantiate a finding that defendant's retail dealer consignment agreement violates the antitrust laws.

Regardless of the alleged violations of the antitrust laws, plaintiff, a private party, cannot assume the role of the Attorney General. Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561 at 576. In order to maintain a suit under the antitrust laws, he must not only show violation but also that he suffered legal injury and resultant damage

as a direct and proximate result thereof. Hunter Douglas Corp. v. Lando Products, 235 F. 2d. 631 at 637; Wolfe v. National Lead Co., 225 F. 2d. 427 at 433; Conference of Studio Unions v. Loew's Inc., 193 F. 2d. 51 at 55.

In the amended complaint plaintiff asserts that he suffered damages in the amount of $150,000 because:

1. he was unable to obtain a lease from defendant for "a reasonable period of time";

2. he was unable to sell or transfer "his proprietary interest as a lessee" to another of his own choosing; and

3. he was prevented from selling his "good will" and from obtaining the "fair market value" of his business.

In his deposition plaintiff states that he arrived at the above amount by estimating his annual profit at $10,000 and claiming that amount for a period of fifteen years. (Plaintiff's deposition, pp. 151, 152, September 10, 1959; filed March 25, 1960.) In essence, plaintiff asserts that he was legally entitled to continue in occupancy of defendant's service station and that he owned some interest other than the one year term created by the expired lease.

In order for plaintiff to recover under the Sherman Act, he must show that he was deprived of a legal right, Keogh v. Chicago N. W. Ry. Co., 260 U. S. 156 at 163, and unless plaintiff had a legal

right to continue in possession of defendant's property he cannot recover damages for loss of possession. Meyberg v. Eureka Williams Corp., 215 F. 2d 100. This court has already held that plaintiff was not entitled to continue in possession beyond the period of the lease, Simpson v. Union Oil Co., 162 F. Supp. 746, and the state court has found Union entitled to possession of the real property as of midnight May 22, 1958, Union Oil Co. of Calif. v. Simpson, No. 102048.

Plaintiff contends that these prior decisions did not consider defendant's alleged violation of the antitrust laws. If it be assumed, arguendo, that the consignment agreement which expired May 22, 1958, constituted such a violation, that fact would not necessarily confer on plaintiff a legal right to a new lease of the service station. It is undisputed that plaintiff's relations with Union were the subject of two distinct contracts. Union concedes that the lease was not renewed because plaintiff violated the provisions of the allegedly illegal consignment contract. However, Union was under no obligation to offer plaintiff a new lease even if plaintiff had complied with the terms of the consignment agreement.

There is adequate authority that plaintiff could not have compelled defendant to sell its product to him, e.g., Schwig Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, affirmed 239 F. 2d 176, cert. denied 355, U. S. 823, and it would seem anomalous if the alleged illegality of the expired consignment

agreement imposed an affirmative duty on defendant to give plaintiff a new lease. In a recent service station dealers suit, similar to the instant action in certain respects, a defendant Oil Company was held justified in cancelling the lease. Alexander v. Texas Co., 165 F. Supp. 53. The court found legal rights under the lease unaffected by the alleged antitrust violations. Plaintiff there, as in the instant case, failed to show that defendant had an actual monopoly or the specific intent to monopolize in violation of the Sherman Act. The plaintiff here has failed to establish damage to him which the law will recognize.

The alleged damages in the amount of $150,000 not only lack legal foundation, but must also fail because the damages are conjectural and speculative. The deposition and records of plaintiff indicate that he went into possession of a General Petroleum Corporation service station in Fresno on June 3, 1958, and that his income therefrom is comparable to the profit he derived when leasing defendant's service station. Plaintiff thus cannot rightly claim actual damages in the amount of $10,000 a year for the period which passed since Union refused to offer him a new lease. Moreover, the damages claimed are speculative, since plaintiff assumes that Union would have retained its leasehold in the Fresno station for fifteen years and would have continued to operate the station by subleasing rather than by direct employees of Union. Damages as alleged here do not entitle a private plaintiff to re-

cover. Image and Sound Service Corp. v. Altec Service Corp., 148 F. Supp. 237 at 240.

Plaintiff also claims that he was damaged in the amount of $1,000 since he was unable to fix the prices for his gasoline during the period of May, 1956, to March, 1958. Assuming, arguendo, that the consignment agreement was invalid, plaintiff has failed to show damage due to adherence to defendant's price policy. The various computations which he advances to substantiate his claim of damage in the amount of $1,000 are insufficient to establish either the fact of damage or actual damages in any amount. Wolfe v. National Lead Co., 225 F. 2d. 427. Allegations of hypothetical losses of speculative and anticipatory earnings do not entitle a private plaintiff to recover. Image and Sound Service Corp. v. Altec Service Corp., supra.

The assumed illegality of the agreement could have afforded a defense if Union had sought to enforce the consignment contract, Continental Wallpaper Co. v. Louis Voight & Sons Co., 212 U. S. 227, but it does not follow that plaintiff would have had any right to assert damages. Both the doctrine of pari delicto and volenti non fit injuria would afford an adequate defense to such a claim. Plaintiff was not compelled to charge a price which he did not desire but merely charged these prices because he knew that otherwise defendant would refuse to deal with him. The antitrust laws imposed no duty on Union to deal with plaintiff, and his claim to relief cannot be founded on alleged coercion.

Danebo Lumber Co. v. Koutsky-Brennan-Vana Co., 182 F. 2d. 489 at 493.

Plaintiff has failed to establish basis for recovery in the amount claimed or in any amount, and defendant's summary judgment motion is hereby granted. Plaintiff's reciprocal motion for partial summary judgment is denied in view of the holding herein.

Dated: December 30, 1960.

/s/ LLOYD H. BURKE,
United States District Judge.

[Endorsed]: Filed December 30, 1960.

In the United States District Court for the Northern District of California, Southern Division

No. 37344

RICHARD S. SIMPSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

JUDGMENT

The Court having heretofore, on December 30, 1960, granted defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment, and it appearing that there is

no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Richard S. Simpson have and recover nothing against defendant Union Oil Company of California, and that defendant have and recover its costs from plaintiff in the sum of $.....

Dated: January 6, 1961.

/s/ LLOYD H. BURKE,
United States District Judge.

Disapproved as to form pursuant to Local Rule 21.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

[Endorsed]: Filed January 9, 1961.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO ENTRY OF JUDGMENT IN SUMMARY JUDGMENT PROCEEDINGS

Comes now the plaintiff and objects to the proposed judgment in the above-entitled action.

The judgment against plaintiff violates his constitutional right to a trial by jury. Beacon Theatre, Inc., v. Westover (1960), 359 U. S. 500.

1. Material issues of fact are in dispute between the parties.

Either the Union Oil Company Retail Dealer Consignment Agreement Program is in per se restraint of trade as established by the present record or the plaintiff is entitled to a jury determination as to its validity in terms of use, purpose and effect, and impact and injury on plaintiff and thousands of similarly situated Union Oil Company dealers after all the facts are in before the fact finding body. It is contrary to law to hold that defendant's Retail Dealer Consignment Agreement Program is lawful under the Sherman Act.

Either the stipulation or admission that plaintiff was denied the opportunity to obtain lease renewals from defendant because he failed to abide by the price fixing directions of defendant, and was forced to leave a business he had spent two years building up, is injurious as a matter of law or else plaintiff is entitled to a jury determination that the acts of defendant in violation of the antitrust laws were injurious to him after all the facts are before the fact finding body.

The issue of the amount of damages cannot correctly be decided in summary judgment and the holding of the Court wrongfully deprives the plaintiff of a jury trial on the issue after all the facts are in.

It is erroneous to hold the plaintiff in pari delicto. The doctrine does not apply here. As a

factual matter, plaintiff was required to sign a retail price fixing consignment agreement in order to obtain a lease from defendant and protested the fixing of retail prices at the time of the lease renewal. For a period of time plaintiff charged his own prices and lost the opportunity to lease the site of his business as a result of such independent discretion.

2. The order of the Court is based on erroneous assumptions:

(a) The plaintiff's case does not rest solely on the contention that Retail Dealer Consignment Agreement as such violates the Sherman Act. Plaintiff respectfully urges he has always attempted to show that the purpose, effect and use of the agreement, in addition to its plain face illegality, marked it in per se violation of the Sherman Act. (See Table of Contents to Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment on the issue of violation of the antitrust laws.) Plaintiff has sought to place the agreement in the context of the market place and the over-all marketing arrangements of Union Oil Company throughout the record.

(b) It is respectfully urged that plaintiff has not conceded that the instant case is not a conspiracy case. Plaintiff has formally urged in the above-mentioned Memorandum, that

"(4) Even assuming arguendo that the retailer dealer of Union can be a valid consignee,

which he is not, the Retail Dealer Consignment Program or Policy is void because it was compelled on the retailer by fear of lease cancellation or the refusal to renew one year leases, and as such is more than a simple refusal to deal, and effectuates a retail price fixing combination in violation of the Sherman Act."

Plaintiff specifically refused to concede that the case did not involve defendants effectuating a combination or conspiracy in "Plaintiff's Reply to Defendant's Supplemental Memorandum on Motion for Partial Summary Judgment. Further, Plaintiff sought to show that the Retail Dealer Consignment Program fixed Union Oil prices at the level of major competitors and that Union Oil sold its gasoline to off-brand dealers who charged below Union Oil's consignment price. Plaintiff has sought to show that representatives of Union Oil Company discussed prices with representatives of an off-brand gasoline distributor-retailer as to prices on the very street plaintiff leased the service station. (Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Violation of the Antitrust Laws, pp. 30-34.)

(c) The defendant as a matter of law has created a retail price fixing combination in violation of Section 1 of the Sherman Act as judged by the standards set forth in the Parke, Davis Case.

(d) The propriety of defendant's merchandising methods is a distinct and necessary element of the

instant action. These methods are in issue and the alleged improper methods of defendants allegedly caused plaintiff to lose the opportunity to continually renew lease interests as to a business he had built up by arduous and long labor.

(e) Plaintiff respectfully contends that the retail dealer consignment program or policy is unlawful on many grounds as specified in its Motion for Partial Summary Judgment on the Issue of Violation of the Antitrust Laws. Plaintiff has not attempted to urge any particular single theory of liability, but each or all.

(f) As a matter of law plaintiff is entitled to either a trial by jury on all issues or a ruling that the Retail Dealer Consignment Program per se violates Sections 1 and 2 of the Sherman Act, and that its enforcement has injured plaintiff.

(g) Plaintiff has suffered injury and extensive damage from the activities of defendant which can be properly approximated or measured by a jury after all the facts are in.

(h) Plaintiff has sought to show that the lease and its one year duration is part of defendant's method of wrongful enforcement of the Retail Dealer Consignment Program.

(i) Defendants are not entitled to a summary judgment as to any issue in the above action and it is respectfully urged erroneous to grant summary judgment in favor of defendant.

Conclusion

It is respectfully submitted that the Memorandum and Order of the Court be set aside and the case be set for jury trial.

Respectfully submitted,

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Certificate of service by mail attached.

[Endorsed]: Filed January 10, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Richard S. Simpson, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 9, 1961.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

[Endorsed]: Filed January 31, 1961.

District Court of the United States, Northern District of California, Southern Division

No. 37344

RICHARD E. SIMPSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

Before: Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT ON MOTION TO DISMISS AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT

* * *

Mr. Lasky: Pardon me. I think we agreed you made a request for admissions for certain letters that are attached are authentic and were sent out, although I think they occurred after the lease expired, we were going to stipulate that the plaintiff now operates a service station selling general petroleum gasoline in the same area.

Mr. Keith: That's correct.

* * *

[Endorsed]: Filed July 14, 1959.

The United States District Court, Northern District of California, Southern Division

No. 37,344

RICHARD S. SIMPSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

Before: Hon. Lloyd H. Burke, Judge.

REPORTER'S TRANSCRIPT ON PRETRIAL CONFERENCE

Thursday, April 30, 1959

The Clerk: Simpson v. Union Oil Company, for pretrial.

Mr. Keith: Ready for plaintiff.

The Clerk: Would respective counsel please state your appearances for the record?

Mr. Keith: Maxwell Keith, attorney for plaintiff.

Mr. Lasky: Moses Lasky and Richard Haas for the defendant. [2*]

* * *

Mr. Keith: Your Honor, with due deference to the Court's great problem of administration, I might say that the United States Congress hasn't left us with any [7] other alternative but to en-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

force these antitrust laws in favor of private parties who have shown their prima facie claim.

The Court indicated months of trial in these cases, and I think what has happened here is we have had two statute of limitation cases of great duration, the Embassy case which ran from the period 1937 to 1950, and the Goldwyn case, which had a similar period of time, and because of the great length of time in those cases, those were protracted trials. I think that the average antitrust case would never equal the length of trial of those two cases and that those are exceptions.

I estimate that the time of trial, at least for the plaintiff in this case, would not be longer than any average tort case. I don't think it would take us more than a week and a half or two weeks to present our case.

This is not a conspiracy case. This is a case of the action and activities of a single defendant. The length of these other cases is basically because you charge a conspiracy involving eight or nine, say, motion picture distributors, and each defendant presents a witness or two on the stand and there is extensive cross-examination of the plaintiff, and you find your trials dragging out. But in a case of this nature where you are suing one party, I don't see how this trial could last [8] longer than three or four weeks, both sides, from beginning to the end. [9]

* * *

Mr. Lasky: Your Honor, I think it is a little premature to talk about a trial date. When Judge

Murphy denied our motion for a summary judgment with the statement that he considered the plaintiff's case extremely thin, he did it without prejudice to a renewal, and we have in mind as a little substance gets on the bones of plaintiff's case in the discovery proceedings that we will probably be back in here. So I think it is premature to talk about a trial date.

Now, before Mr. Keith gets into his particular agenda that he wants to bring before the Court—we have ours, too—it might be helpful to the Court if I were permitted to take about two minutes to state very briefly the aspect of the case as we see it. Do you mind, Mr. Keith? [12]

* * *

This suit is brought against Union Oil Company, no one else, and the gist of the whole case, as we read the complaint and as we still read it, is that Union Oil Company does not sell its gasoline to retail dealers, but it has a method of appointing agents, consignees, and the consignee agents sell its gasoline at the prices it sets for them. The plaintiff in this case was one of its consignees.

He had a lease, and the lease terminated by its own terms. It came to an end and we did not renew it. And two days before he had to vacate because the lease terminated, he filed this suit—two or three days—and he sought an injunction to prevent himself from being evicted. We came in and we opposed the injunction because we said there is nothing in the antitrust laws that can compel us to lease

our property to him; he has no right to make us deal with him, and whatever his complaints might be about the consignment, he had no right to get a lease. Judge Harris denied that injunction with an opinion which concurred with our contention, namely, there is nothing in the antitrust laws which compels us to give a lease.

We then moved to dismiss the case and by stipulation [13] the motion to dismiss was granted; but it was agreed that he could amend his complaint and, by amendment, to change his cause of action from one seeking an injunction whereby he could get a lease to one claiming damages because he did not get one.

And that is when we moved for a summary judgment, because we submitted to the Court he had no legal right to make us lease property to him, and, therefore, could sustain no legal damages because we declined to. And it was in response to that Judge Murphy made his statement that he considered this case extremely thin. [14]

* * *

The other branch of the plaintiff's claim was that during the period when he was a lessee and a consignee, he suffered a thousand dollars damages because he was not able to sell at the prices he wanted to sell, although it was our gasoline.

So that since we are told this is not a conspiracy case, there seem to be two very simple legal questions, which first ought to be resolved, because if they are resolved in the way we think they should

be, that is the end of the case, and you don't have to go into a lot of discovery; and if they are not resolved out way, we will at least find out what evidence might be pertinent to them.

We stated six or seven of these questions, but they really boil down to two: What right under the law has he to compel us to lease to him? And if he has no right under the law, how can he claim damages?

And, secondly, if he was our consignee—and the gist of his claim of illegality is that it is illegal for us to consign—first, is it illegal, and, secondly, if it is illegal, what damage did he sustain? If the contract was not binding on him he could have sold at any price he wanted.

Those are the two simple questions and why [15] should we go off into a tremendous excursion, churning up all kinds of documents and all kinds of evidence when these essentially are the questions? And this is why I say in our course we will probably be back with another motion for summary judgment.

I think that is the simplicity of the case, and I would respectfully submit to the Court that as the agenda proceeds this afternoon, if everything that is read is read in context with that simplicity it is going to forward the disposition of the case. [16]

* * *

Mr. Keith: I think that the Court could very well, upon the record that we have, plus one additional factor, the total amount of gallonage sold

under these agreements, find this thing unlawful on its face. But even assuming the Court does not find this consignment agreement unlawful on its face, I don't think there is any question that Union Oil Company can take a consignment agreement and force it on the lessee. [19]

* * *

And yet what is the situation in this case? It is admitted in the answer here that the reason why the lease was not continued with Simpson was because he violated the retail dealer's consignment agreement. This is in the answer as I read the answer.

* * *

And the minute they admit in their answer that the reason the lease was refused was because Simpson was attempting to get out of the leasehold deal and consignment agreement, they are admitting they are violating the standards of the Richfield Oil case. [20]

* * *

The Court: What you two gentlemen have said, it seems to me that we can agree upon the facts, and if we can fix the damages, if any, you can go upstairs and get the answer from the group that has more or less the last word.

Mr. Keith: Well, I don't see how, your Honor. This Court can make a pretrial determination as to the legality or illegality of this consignment agreement on its face. But that does not preclude going

into the question of coercion, which is a factual question. We have here—this question perhaps will be admitted also by the defendant—if they want to admit this point, I have no objection—but this is what the general sales manager of Union Oil Company says about how these consignment agreements work, and I am quoting from a document which is admitted to be genuine and authentic for the purposes of this action. This is the instructions given by the general sales manager of Union Oil Company to its men in the field: [21]

"A thirty days' notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation document becomes effective, we will then sign the dealer to the new agreement and give him a special letter which will be effective as previously set forth herein."

This is how this consignment agreement is being enforced in these lease cancellations. I am wondering how this can be done in view of the Richfield case.

But if we stipulate to this letter as being the general policy of Union Oil Company at all times herein and we get the gallonage figure of interstate commerce, I will present the issue of liability to this Court in a partial summary judgment motion.

Mr. Lasky: Now, let me take just a moment, please. Am I interrupting your Honor?

The Court: No. It seems to me there is a lot of merit, not necessarily to the position he takes but to the statement he has made that you are appar-

ently not in disagreement as to the facts, merely as to the application of the antitrust laws to those facts. Now, it seems a little wasteful to go to any great extent to prove that since you are both willing to concede, and [22] it would seem to me if we would get to the question of damages, it wouldn't make much difference which way I decided the case. If you have got a complete agreement as to what the factual situation is, you will get a final answer in much shorter time and dispose of it without the necessity of trial, other than perhaps on the issue of damages.

* * *

Mr. Lasky: Now, if the Court please, we have a consignment, and the documents have been brought in. There is no dispute about the form of lease and the form [23] of consignment.

The essence of consignment—and it is stated in the California Civil Code—is that the consignor retains the ownership and title and he tells the consignee as his agent what price to sell it at. So if you wish to state that it is a method by which we control the price at which the product is sold at retail, surely it does, because we own it and we are selling at retail.

Mr. Keith says he doesn't attack the legality of consignment. If he doesn't attack the legality of consignment, he doesn't attack the right to fix the price, because that is the essence of consignment.

Then the question arises, does he claim this wasn't really a consignment but merely a subterfuge? And,

if so, what is the difference between a subterfuge and a real consignment? Nothing but words.

Then I go beyond that. Suppose this were—and let me say the McKesson & Robbins case has nothing to do with the problem, because that has to do with fixing the price of a reseller, and the Richfield case has nothing to do with it because in that case Judge Yankwich said, "This is not consignment."

Suppose there were something illegal about the consignment. That would have permitted the United States Government to come in and sue Union Oil Company [24] criminally or civilly for an injunction. But we still say there is a legal issue. What right has that got to give the plaintiff to insist that we give him a lease? In other words, we say to him, "Now, this is our property. Do you want to deal with us? Do you want a lease on our property? If so, this is the way we do it: If you don't want to do it this way—if you think it is illegal, all right, you don't have to deal with us; you don't have to get a lease."

But what is there in the antitrust laws which might subject us to criminal liability that compels us to turn around and give any stranger a lease on the property?

Now, Mr. Keith——

The Court: Pardon me, Mr. Lasky, but doesn't that situation which you just mentioned exist in almost all price fixing arrangements or attempts at price fixing? "If you don't want to take my product under the conditions that I offer it to you, you don't have to do business with me."

Mr. Lasky: Yes.

The Court: Which I understand to be the essence of an attempt to fix prices through a retail outlet.

Mr. Lasky: Oh, yes, but nobody can come in and compel us to sell to him. The antitrust laws do [25] not give anybody the right to compel us to give him an estate in real property. Can this Court or any federal court say to the Union Oil Company, "You must give a lease to Mr. Simpson"?

The Court: I think, unless I am very much in left field as far as this case is concerned, that Mr. Keith has contended that the lease is used as a weapon by the company in effecting a price control system and that the withholding or refusing to renew that lease is the method by which an illegal price fixing arrangement is maintained.

Mr. Lasky: This is his theory, and if there were any substance to it legally, I say the United States Government in a proper suit could make us cease such a system, but it doesn't go so far as to say that he can come in and get a lease from us. And the briefs that we have heretofore filed in this case are quite replete with federal cases that say just that, and, of course, that was the essence of Judge Harris' ruling.

The Court: I think that maybe we are getting a little far afield from the purposes of a pretrial conference. My original question is this: Isn't it true that you are so close together on what the factual situation is that you can stipulate to the facts in connection with whatever exhibits you want.

and then we can get down [26] to the question of damages, put it together in a package, and one of you can take an appeal and we will have this settled once and for all?

Mr. Lasky: I imagine we could get very close to it.

* * *

Mr. Keith: Well, this would be, of course, res judicata to the issue of coercion if we went into that issue. At the present time I would like to think about this, because the issue of coercion—I say there are two issues in this case, the issue of liability: No. 1, the consignment agreement is unlawful on its face [27] as a matter of law. And this, of course, I would have no objection to presenting in a pretrial form of partial summary judgment.

On the issue of whether or not the consignment agreement is coerced on unwilling lessees, this is a factual question, and, of course, the determination of this Court would be res judicata to presenting that question to the jury.

The Court: Mr. Lasky, suppose we give summary judgment on the——

Mr. Lasky: On the question of whether the consignment agreement on its face is illegal. Counsel says it is a question of law on its face and I agree it is a question of law on the face of the document, and it would be appropriate for the Court to make a partial summary judgment on that issue.

The Court: And it won't make any difference which way I rule. You both have an opportunity

to get the answer before you go to the time and expense of threshing out the other issues.

Mr. Lasky: I think this would make progress in the case.

Mr. Keith: Frankly, your Honor, my position is, unless this Court has any strong reasons contrary, I would like to see this case be set for trial as soon as [28] possible and that we go to trial on the case; that all the facts go in and have this thing settled in one trial. As I say, this is not an extensive case. It is going to be a short, simple trial. I think on the proper certification to the Master Calendar Judge, this case will appear in the regular course of jury trial, it will probably be tried within three to four months, and I think this would settle the thing.

I don't know why we are going to advance too much by this interlocutory appeal. If I don't have a case, I will be non-suited. If I have a case, the jury will decide the damages. This all could happen before the end of the year.

Mr. Lasky: Except it will take a lot of work getting together all kinds of evidence when you don't know whether you are going to need it or not.

Mr. Keith: There is a lot of work and expense on appeal also. And all you are going to accomplish in an interlocutory situation, where if I win we are still back, and if I lose we are still back.

The Court: If you win, it is going to be dispositive of the question of liability and there is only going to remain the question of damages.

Mr. Lasky: Now, I can put the issue of coercion,

I think, in a fashion that allows your Honor to [29] dispose of it, or pretty close to it, which is this: Counsel alleges—this is one of the questions we put in the agenda—when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products and the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

The Court: That is precisely what you mean by the word "compel"?

Mr. Keith: This statement is correct.

The Court: And to the extent that that may be regarded at coercion, you will stipulate to that, is that right, Mr. Lasky?

Mr. Lasky: Why, yes. I don't stipulate it is coercion, but I say these are the facts.

The Court: If that constitutes coercion——

Mr. Lasky: Then we coerced him.

The Court: And you compelled him to follow this [30] practice?

Mr. Lasky: We had a consignment contract with him and we expected him to live up to it.

The Court: And which substantially means that he did it or went out of business?

Mr. Lasky: I don't stipulate that our failure to give him a new lease was due solely to the fact that he was violating his consignment contract. There were other factors.

Mr. Keith: It doesn't appear in the answer, Mr. Lasky.

Mr. Lasky: The answer denies your allegation that that is why we put him out. He was a generally unsatisfactory dealer, as far as we were concerned.

To state a legal question, I would be willing, I think, to go so far as to say, assume—assume that this was the only reason we did not care to give him a new lease, because he was not willing to live up to the terms of the consignment contract——

The Court: Although you may have a second string to your bow, are you willing to eliminate that——

Mr. Lasky: The second string——

The Court: ——to get an answer—this possibility that he may have been unsatisfactory?

Mr. Lasky: I would like to give some thought to [31] that and talk to my associate here. [32]

* * *

The Court: Mr. Lasky, you are as interested in getting a definitive statement of the law from the appellate court as applied to these contracts as either Mr. Keith or I am?

Mr. Lasky: That's right.

The Court: If we inject this new issue of whether the satisfactory or unsatisfactory opera-

tion of the station was a factor in the decision made by the oil company, we may come out with an answer that is worthless to either one of you in future cases. Isn't it worth it to just leave that issue out of it entirely?

Mr. Lasky: It may be, but I would want something else eliminated from this case which the plaintiff has injected in his pleadings and which is as phony as a two dollar bill.

There is an allegation in here about attempt to monopolize. Now, how Union Oil Company, which is only one of the seven major oil companies and one of numerous others, is monopolizing, and how in the City of Fresno, where it had about fourteen service stations out of a [33] total of close to three hundred is monopolizing, I don't know. Is this issue in the case? Does counsel contend there is a monopolization issue in the case?

Mr. Keith: Well, for the purposes of the Judge's suggestion, I wouldn't, but it would be an issue to be decided by the jury assuming this case did come back.

Mr. Lasky: In the hopes of expediting it, if counsel will take the monopolization issue out of the case and agree for our purposes that there is no claim of monopolization, no monopolization, I would be disposed, still subject to a recess, to take this unsatisfactory dealer on other grounds out.

The Court: That is the weakest part of your position, isn't it, Mr. Keith?

Mr. Keith: Well, yes.

The Court: The monopoly factor?

Mr. Keith: Now wait a minute.

The Court: Maybe we can get an answer to it and get on the road.

Mr. Keith: There is a tendency for the defense lawyers to confuse about the word "monopoly" and "attempt to monopolize." Maybe Union Oil doesn't have a monopoly; maybe it doesn't have ninety-five per cent of the industry, but it does have sufficient control. We are talking about—how big is this company? Millions [34] of dollars——

Mr. Lasky: The law doesn't say that it is illegal when you get over a hundred thousand.

Mr. Keith: We are talking about that kind of factors we have when we intend to control good will—such things as good will, such things as profit, such things as exclusive licensing. We are talking about Section 2.

It is significant, your Honor, that when the Supreme Court came down in that Klor case, they didn't limit that case to simply a conspiracy. It said also Broadway Hale, a person who had allegedly started a group refusal to deal, was tending to monopolize, the Court said.

Mr. Lasky: But this was on the allegations of the complaint which were not denied for that purpose. That is why I say I don't want this case to go up with an allegation of monopolization in there without trying it.

Mr. Keith: Section 2 is strong in this kind of a case because this is a single defendant situation such that I didn't want to give up settling.

Mr. Lasky: Does counsel want to dispose of the

monopolization issue by stipulating how many thousand service stations there are in the State of California, [35] how many companies have how many stations, how many we have? We can give him those statistics. They have all been compiled, incidentally, for use in the suit the Government has pending down in San Diego, the pretrial. If he wants to stipulate that issue out of the case by saying there is no such issue, or——

Mr. Keith: Will you stipulate that Union Oil prevents a lessee from selling good will to a purchaser if he has to get out of the station?

Mr. Lasky: Of course not.

Mr. Keith: I think that is monopolization.

Mr. Lasky: I say when a lease terminates and we don't renew it, he can sell whatever he has got under the law. We don't prevent him from selling anything. The point is he doesn't have anything.

The Court: What has he got to sell?

Mr. Keith: He has good will if he could ever sell it.

The Court: He can't sell it without a lease.

Mr. Keith: Pardon me?

The Court: He can't sell it without a lease.

Mr. Keith: These fellows do exchange these stations, or attempt to, and they know very well, as we all do, that these leases are continually renewed. If you have a good gallonage record and you are honest and [36] loyal and so on, you are going to be on there forever. This has salable value because you are building up a clientele with that station

and it has value. But this doesn't actually happen because they don't allow the sale of good will.

Mr. Lasky: We don't allow it? The new lessee can come in and pay what he wants for it.

The Court: Wait a minute.

Mr. Keith: Simpson was stumped here. He didn't choose the purchaser, it was chosen for him, and all he got was his inventory and equipment, and he lost on that. That is how it worked.

Mr. Lasky: When a lease terminates, a man has no leasehold interest to sell to anybody, but if a new lessee comes along and wants to buy Mr. Simpson's personal property there or inventory of oils and greases he bought from someone else, we don't do anything to prevent him from selling it. And if there is a good will, he has customers that like Mr. Simpson, we don't do anything to prevent him from selling that to the successor. All we do is we don't give him a new lease and he has no lease to sell.

The Court: I think a realistic appraisal of that situation indicates that there is nothing to sell, or there is nothing that is practically salable as a practical [37] matter. You can't sell anything unless you can tie it in with the lease.

Mr. Keith: People sell different things. As long as people are willing to buy, you can sell something. And people are willing to buy these service stations, and Judge Yankwich——

The Court: Without a lease?

Mr. Keith: Because you know there is perpetual renewal, that is the point. Somebody will come along

who wants to go in the gasoline business and he will look at your customer situation, your customer accounts and figure, "This is a good station; this guy has built up a real good clientele here," and he will buy and pay for good will. This is a potential. It doesn't happen. And I think Judge Yankwich in the Richfield case talked about this inability to get good will.

The Court: Aside from this monopoly question, do you think your case is strong enough to hold up without it?

Mr. Keith: Oh, well, as I understand the Judge's situation, we are going to reserve——

The Court: I would like to decide the case now on a set of facts that you people can agree upon. And as I see it, outside of the fact that—I will try to [38] come to a decision that I think will be supported; I don't think it is going to make a bit of difference which way I go when it comes to a determination as to whether or not the law is as you contend it to be or as Mr. Lasky.

Mr. Keith: As I say, I was concerned about this coercion point. I had assumed as we went through this we would reserve the coercion point for a jury trial.

The Court: I think he is willing to stipulate, unless we are down to the very question of semantics, he is willing to stipulate to the facts, which, as I understand your position, do constitute coercion or——

Mr. Keith: That your lease will not be renewed

unless you agree to sign the retail dealer consignment agreement; is that the stipulation on that?

Mr. Lasky: I haven't gone quite that far.

The Court: I think you came pretty close to it.

Mr. Lasky: Pretty close to it. I said the only way we coerced the man into accepting a consignment agreement for a lease is by refusing to deal with him on any other basis. We say to him, "This is the kind of lease we have and this is the kind of dealer supply contract we have. If you don't want this, we don't deal with you." I will stipulate to that.

The Court: That is just exactly what your [39] position is, isn't it, Mr. Keith?

Mr. Keith: Yes, but I mean——

Mr. Lasky: If that is coercion, let the conclusion follow. We deny that it is.

Mr. Keith: You tie the two agreements together and refuse to lease if the man does not sign the retail dealer agreement, and if he doesn't abide by the retail dealer agreement, the lease is cancelled.

Mr. Lasky: No; his lease is not cancelled.

Mr. Keith: Or not renewed.

The Court: It is not renewed.

Mr. Lasky: Well, we can't cancel.

The Court: You can't cancel, but you won't renew it.

Mr. Lasky: You see, that is not in fact the truth of our situation. From a legal position——

The Court: You contend that under the law you don't have to renew it——

Mr. Lasky: That is right; that is my contention.

The Court: So it isn't going to make any difference under your theory.

Mr. Keith: I don't quite follow this, your Honor.

Mr. Lasky: Except, I suppose, an appellate court could decide that that subjected us to liability. I am so confident of my position on it that my own temptation [40] is to make that stipulation, but I would want to check with my principals on it, which I could do by telephone and be back here in the morning. I am that confident of our position.

Mr. Keith: I would be willing to do——

Mr. Lasky: I mean if it gives us a test case, it gives us something more than winning a particular case.

The Court: It seems to me you are both going to save an awful lot of time and effort and money.

Mr. Lasky: But it is contingent——

The Court: You are both agreed as to the facts and you are in disagreement as to the law. A trial isn't going to change the law and it isn't going to change those facts.

Mr. Lasky: My statement would be contingent upon getting this monopolization issue out of the case.

The Court: You have got a policy decision, I understand that. And I assume that perhaps Mr. Keith has something else in mind, too, but at least we ought to get an answer on this pilot run.

Mr. Keith: It certainly is a cogent suggestion. To my way of thinking, I think the best thing to do is to set this down for trial as soon as possible and carry this thing through as any other lawsuit.

Now, absent [41] that and absent the administration problem, and if we are not able to get a trial for a year, it certainly isn't going to take any more time to do it this way. I don't think this should be a settled practice to do this.

The Court: If there is any merit to the proposition that a pretrial consideration of a case of this type should lead to either a summary judgment or earlier disposition, this is a case that should give it a run. And if we don't do it in this case, we won't do it in any other case. There is no reason to not do it.

Mr. Keith: Well, we do have the problem of damages for plaintiff.

The Court: I don't think the damage problem is going to be any great problem, Mr. Keith.

Mr. Keith: The question of a monetary amount.

Mr. Lasky: Mr. Keith, isn't this true: Mr. Simpson, shortly after he left these premises, became a dealer for General Petroleum Company in Fresno? You have already stipulated to that in one of the previous hearings. We know very well that he has been doing business there, so that if you produce and show how much he has made there, it may show that in fact he has lost nothing by being out of these premises, and then the case squeezes down to your claim of a thousand dollars damage because he allegedly couldn't sell at [42] the prices he wanted while he was one of our consignees. Can't you produce the facts upon what he has done with General Petroleum? He became a dealer for them within a few weeks after he left us.

Mr. Keith: This would really——

The Court: This would save you money if you should fail under the National Lead case.

Mr. Keith: This would really take away the trial by jury situation, your Honor, to go into that question on a stipulated record which would be res judicata. We really are getting into the factual situation when you go into injury and damage. I have various theories, we have various testimony.

The Court: Suppose you find there has been no damage because your legal theory is wrong, you will never get a chance to prove it.

Mr. Keith: I mean, if we would stipulate that the damages would be X amount, why, if there is a plaintiff victory and there would be nothing in a defendant victory—if we could do something like that, why, I suppose we could stipulate.

The Court: Both sides are certain as to your legal position. Can you get together on a reasonable X?

Mr. Lasky: I would want to see what he has done as a dealer since he became a G. P. dealer. All I [43] know is he became a dealer. I knew no more about it. And as for his alleged thousand dollars damages on the other angle of it, I don't know that I can stipulate to anything about that, because there is no way he can show his damage. I would want to hear him explain his theory on that.

But again, I think we ought to be able to come to agreement on the basic facts, the evidentiary facts which pertain to the damages.

Mr. Keith: Well, I have a damage estimate run-

ning from fifty-five thousand to one hundred fifty-two thousand, and if we can stipulate that, assuming we are correct on our theories of liability and damage, the plaintiff would then have a judgment of $55,000. I suppose we could go along on that basis.

Mr. Lasky: You move pretty rapidly there.

The Court: I would say that the X was getting larger as the afternoon progresses.

Mr. Keith: This is an illustration of the problem we are going to get into if we certify an injury and damage point.

Mr. Lasky: Well, then, let's get back to the liability phase alone. Maybe we can take care of that expeditiously.

The Court: A partial judgment on liability. [44]

Mr. Keith: I think there is something that counsel for defendant wants to contact his principal about. I would like to think it over, too.

* * *

The Court: What do you want to do with it? Do you want to consider this possibility of stipulating as to the facts, at least legal issues, and go up on a Black & White proposition, and I will give summary judgment one way or the other on liability?

Mr. Keith: Tentatively, your Honor, I think I would be willing. [45]

* * *

Mr. Keith: This is still subject to change, isn't it, or are you definitely committed now?

Mr. Lasky: No; I have got to call my principal and I thought you had to make some decisions, too.

Mr. Keith: That is what I thought, yes. I would like to think about it one night. As I say, it seems to me a cogent suggestion.

The Court: I frankly think that you will both be a lot better off if you get this major point of disagreement behind you.

* * *

[Endorsed]: Filed July 22, 1959. [46]

[Title of District Court and Cause.]

FURTHER PRETRIAL CONFERENCE

Before: Hon. Lloyd H. Burke, Judge.

May 21, 1959

The Clerk: Simpson vs. Union Oil Company of California, and Lessig vs. Tidewater Oil Company, further pretrial conference.

Mr. Keith: Ready for the plaintiff.

Mr. Lasky: Ready for defendants. [2*]

* * *

The Court: Why, I am not about to start reading the proceedings at some deposition, Mr. Keith. So far we haven't gotten any place in this case this afternoon. Let's start with the first one. You did say that this is not a conspiracy case, didn't you?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Keith: Insofar as the case does not involve a conspiracy between the Union Oil Company and any competitor in the distribution or production or retail of gasoline. [23]

The Court: "That is to say, plaintiff does not charge or contend that any act, conduct or omission of the sole defendant, Union Oil Company of California, is or was done or was illegal because done in combination, conspiracy or agreement with anyone else?" That's right, isn't it?

Mr. Keith: No, your Honor, not with "anyone else." With any competitive company, that is what I restrict that to.

The Court: Accept the alteration?

Mr. Lasky: Well, I can't change his contentions. But then I would like to know with what other person other than a competitor are we supposed to have conspired. I want to know that. I can't change his contentions, but I am certainly entitled to know what they are with great explicitness.

The Court: What is your answer to that, Mr. Keith?

Mr. Keith: Well, the Supreme Court——

The Court: What is your contention in this case, Mr. Keith? Who are they supposed to have conspired with if not their competitors?

Mr. Keith: This is a question for the Court, your Honor. The Supreme Court in the Dr. Miles case concluded that Dr. Miles had forced, in effect, a conspiracy between all his retailers. Now, I don't want to take that issue from the Court if the Court wants to so find.

It's not a conspiracy between competitors. But this is a legal issue. I don't want to be precluded from any [24] determination the Court might want to find at any proceeding in this case.

Mr. Lasky: Counsel, you said that your complaint did not not charge conspiracy——

Mr. Keith: Right——

Mr. Lasky: ——but you claimed an agreement——

The Court: When will you be ready to go to trial?

Mr. Keith: At any time, your Honor. I would say a month's notice and we can get the case to trial.

The Court: How do you feel about it, Mr. Lasky?

Mr. Lasky: I would just as soon go to trial.

The Court: I don't think we are going to get any place in pretrial. Pretrial is for the purpose of narrowing the issues, and so on, and assumes that there is going to be at least a modicum of agreement between counsel. I don't see any indication of any such tendency to agreement or anything else in this case.

Mr. Keith: Your Honor, I think that we are——

The Court (Interposing): Every time we have anything in the way of a proposed understanding on the facts we come down to a question of semantics and a complete avoidance of any black and white issue.

The last time we were here, Mr. Keith, you were quite certain that the face of the consignment agreement was the crux of your case. [25]

Mr. Keith: Yes, insofar as we knew the relevant facts of numbers and——

The Court: Now, on the first possibility of an understanding of the theory on which you are going ahead we find some sort of a nebulous thought that perhaps there is a conspiracy between the dealers, the oil company and some other unidentified, non-competitive groups.

Mr. Keith: Well, of course, your Honor, I think this is a legal conclusion that is being asked. This is not a fact at all.

Mr. Lasky: It's the contention, though.

The Court: What is your position in this case? You have got about five strings to your bow already.

Mr. Keith: Well, as I say, the complaint does not charge conspiracy. It says these contracts are in restraint of trade. If the Court desires to eliminate this issue, I will eliminate the issue. The central issue here is contracts in restraint of trade and monopolization. [26]

* * *

Mr. Lasky: Now, I stipulate that the form of lease we used is the one-year form. I am willing to stipulate—I have said I am willing to stipulate that here are the consignment agreements. From this, without my stipulating to anything more, counsel is in a position to say, "See, you, the defendant, are in a position with these instruments to do thus and so." [41]

* * *

Mr. Keith: Yes, to enforce the consignment agreement, and I am merely saying, does that include the fact that the one-year lease was used to have the agreement signed in the first place, which is another contention.

I am saying clearly that it was the policy of the defendant not to give leases to people who wouldn't sign the retail dealer's consignment agreement.

Mr. Lasky: I answer that in my motion for summary judgment by saying, "Suppose it's true? We have a legal right not to lease to anybody [43] that"——

* * *

The Court: Can you conceive of a motion for summary judgment in such form now, Mr. Lasky, which, if denied, will, with proper certification, allow you to go up and test the [45] validity of your consignment agreement and the one-year lease in combination?

Mr. Lasky: Yes. But there is one element that I can't appraise in trying to get a sharp issue, and that is this allegation in general terms about monopolization. I haven't any conception of what a court above would have of what bearing it has on the case, and I do wish that that contention would be sharpened and stated by counsel so we could know just what that contention is. If it weren't for that vagrant, floating contention, I wouldn't hesitate a moment to say, "Sure, we can get a very sharp issue about consignment agreements. Take it up."

The Court: A few weeks ago I thought we had the monopoly question pretty well disposed of.

Mr. Keith: Yes; we do have monopoly disposed of. Monopoly as such is out of the case. But it is my contention, right or wrong, that when an oil company of this size puts on the market place an agreement fixing prices of over 3,000 otherwise independent retailers, that this is an act of monopolization; and that, further, there is monopolization going on in 4,000 service station sites by control of the activities of lessees with respect to prices, with respect to exclusive dealings in petroleum products.

The Court: And you think this is a proper case in which to raise that issue on behalf of your [46] client?

Mr. Keith: Well, it certainly does——

The Court (Interposing): I am not inclined to quarrel with your logic insofar as the monopoly aspect is concerned, but I do question its value.

Mr. Keith: Your Honor, I have raised the question because I feel that these acts have a definite injurious impact on the plaintiff. He couldn't choose his successor when he sold out; he lost money on his inventory and equipment.

The Court: Well——

Mr. Keith: Well, I will limit the charge of monopolization to what I just said. In other words, it is another choice of findings as to the consignment agreement, if you so want me to.

Mr. Lasky: I didn't quite understand. Let me see if I understand. I don't want to put words in your mouth, Mr. Keith.

You do not contend in this case that there was a monopoly by the defendant, Union, and your con-

tention with respect to monopolization is merely that by virtue of owning or holding leasehold interests in a certain number of service station sites and leasing them to people with whom the company also enters into consignment agreements, the company is guilty of attempted monopolization. Now, that's the contention?

Mr. Keith: Consignment agreements which control prices, which allow the company to fix [47] prices.

Mr. Lasky: I understand. You are talking about these consignment agreements?

Mr. Keith: These consignment agreements. Plus interfering with sales of property and leasehold interests.

Mr. Lasky: Well, now, you see, there again, now we get off the beam. We don't interfere with anybody. We give them a one-year lease. When the lease is over if we don't renew it, what does the man have to sell?

Counsel has his argument, but—well, I understand his argument. Now, it seems to me that to make this point sharp we should have, then, a stipulation which shows the total number of sites that we have, the total number of leases, the total number of consignees; and we should also have, so the thing can be appraised as a whole, a stipulation as to what each of the other companies have in the way of service station sites. I can readily obtain that.

The Court: Well, why don't you do this: Why don't you give Mr. Keith all that infofmation?

Mr. Lasky: I will be happy to.

The Court: You certainly ought to be able to make a pretrial statement of just exactly what your position is.

Mr. Lasky: All right.

The Court: That can supersede the pleadings. On the basis of Mr. Keith's statement of what his position is, you can move for summary [48] judgment.

Mr. Laskey: Yes.

The Court: All right. I will deny the motion for summary judgment and certify it to the Court of Appeals. How's that?

Mr. Lasky: Fine. Very good.

The Court: We will have a flat decision as to whether or not, if Mr. Keith can put down what he is really thinking in black and white, whether or not that is enough to support a case. [49]

Mr. Lasky: * * * Now, if counsel will state explicitly these contentions, I will be ready, I think, to go ahead on the suggestion that has been made. Motion for summary judgment renewed, and get the issues. But if the contentions still remain vagrant——

The Court: Once it can be pulled together in some fashion so we know what Mr. Keith is talking about—right now I don't think there is anything for me to rule on, [50]

Can't you put something down, Mr. Keith, in the way of a statement of your case, omitting the words which give rise to so much argument here, such as "forced," "coerced," and state what happened?

Something to supplant the pleadings in this case and on which the precise issues that you have in mind can be reviewed by the Appellate Court.

Mr. Lasky: What leads to the length of trial in these antitrust cases is not really the sharp issues; it's these hidden things that one really doesn't quite know what they are, that lead you to bring in all kinds of evidence to protect your clients.

The Court: Well, originally Mr. Keith had a nice, clean position: Either these agreements, in combination with the one-year leases and the use to which they were put by Union Oil Company, was a violation or it was not. If it was, then there only remained the issue of damages. But now I am frank to admit that I am somewhat confused as to what, in addition to that, plaintiff is relying on?

Mr. Keith: Well, what I am bothered with, your Honor, is, assuming there is an appeal and assuming there is a reversal, what is the law of the case in that situation? Am I precluded because of what I have agreed to for the purposes of (not completed)——

The Court: I would say if your statement of your case in all details of what you intend to prove is not regarded [51] by the Court of Appeals as a proper basis for action, I think you are through.

Mr. Keith: So I have to be careful about what I am going to do next.

The Court: I would say you have to be very careful. But no more so than you will be at the time of trial. Unless you can prove a case at the time of trial you are no better off than you are

now except that you are getting the advantage of a little early action from the Court of Appeals and might save some money.

If you haven't got a case now on the facts as you propose to prove them, it isn't going to be any better at the time of trial, is it? And if it isn't a case after trial, it isn't a case now, and vice versa, and you are going to be reversed then anyhow.

Mr. Keith: Well, I can see in a trial situation where I am going to be able to prove, say, five or ten dealers were cancelled out because of this consignment agreement program. Now, if this issue is eliminated by this process——

The Court: Why don't you just include those assumptions in your statement of facts?

Mr. Keith: I am sure we would never get an agreement on it. As I say, they have left out entirely the issue of this one-year lease consignment agreement situation. They have just ignored it entirely, in their stipulation. [52]

The Court: Mr. Lasky, isn't it your contention that even if you do cancel out everybody that has a one-year lease and who violates the consignment agreement, that you are still entitled to summary judgment?

Mr. Lasky: Yes.

The Court: If he includes that in his statement you are still entitled to it and will take an appeal, isn't that right?

Mr. Lasky: Yes.

The Court: Well, then.

Mr. Lasky: If there is a clean-cut statement

without a lot of weasel statements in there, why, sure.

The Court: Well, let's leave out the words "coercion" and "forced" and some of that meaningless garbage——

Mr. Keith: I haven't used them.

The Court: ——and get down to the crux of the case and put down everything you think has any bearing on your position. Mr. Lasky says you can't prove a case, no matter what you do.

Mr. Keith: Could you say what you just repeated, that you wouldn't have any objection if I put what in the statement?

Mr. Lasky: Why, I haven't any objection if you put anything in your statement of contentions if you leave out the general words. [53]

Mr. Keith: You specifically said on this issue that you felt it would be legal if the company would refuse to allow a lessee renewal of his lease if he didn't sign the consignment agreement, is that correct?

Mr. Lasky: Yes; I said that. That is my theory. And I also said that even if it were true that we had refused to renew four or five others for like reasons it wouldn't make any difference. I said that.

I had entertained a mild hope that maybe we could stipulate to enough facts so that we could submit it to the Court for a trial on the stipulated set of facts instead of on a summary proceeding.

The Court: I had hoped that the same thing might be possible, but there is none of the textbook

atmosphere of pretrial about this proceeding. I am inclined to think, under these circumstances, all the fine words that have been used to describe the advantages of pretrial are somewhat nonsense.

Pretrial doesn't work unless the parties are in a frame of mind to at least compose some of their basic difficulties, and there is little indication in this situation of that being true. But is there any reason why you can't state your full case, Mr. Keith?

Mr. Keith: Why, I certainly will attempt to do so.

The Court: If you can't do it now, I don't know how in the world you can even think of going to trial in a month [54] or two months or at any time. You know what your theory is.

Mr. Keith: I can state what I consider to be the ultimate facts in the case. The problem has always been to see if we can get an agreement to those facts. I can certainly state my position very easily.

The Court: You don't have to have an agreement from Mr. Lasky. He says that no matter what you say you still are not going to be able to show a violation, and I am quite willing to give him an opportunity to find out whether or not three gentlemen on this floor or the next one agree. [55]

* * *

Mr. Lasky: * * * I assume that if and when I come before the Court with a motion for summary judgment, despite the Court's present attitude on this first issue, you will listen to me with an open mind. I think I can persuade you.

The Court: I haven't any fixed view in this. I just think it is something that ought to be settled one way or the other on appeal before we get down to a trial. [58]

* * *

Mr. Keith: This is a little more limited than what I asked for. I asked for the letters that would correspond to that letter of 1958 which sets up the operation of the program, the explanatory letters from the head man in Los Angeles to the field men explaining the program, and whatever statements are contained in there are contained in there.

The Court: If there are any such letters, Mr. Lasky, will you give them to Mr. Keith?

Mr. Lasky: Yes, your Honor, I will do so.

The Court: How long will it take you to get your statement together?

Mr. Keith: Twenty days, your Honor.

The Court: All right. And you will move for summary judgment?

Mr. Lasky: Well, of course, if he puts some statements in there that take a trial to refute——

(Simultaneous conversation.)

Mr. Keith: I will give Mr. Lasky a draft of my proposal and see if we can really sit down and write one up.

The Court: This doesn't mean you have to agree on the facts as such. You are just agreeing on whether or not your position is the position that you will contend does not have any basis in law. [64]

Mr. Lasky: Yes. Now, in this connection it seems to me that there should be enough in it as to the nature of his claim for damages—not the amount, but the nature, because I want to be able to say that the nature of his damages are such that he could not recover. That, of course, was already involved with my motion for summary judgment, that damages for loss of good will because he had no leasehold interest to sell are not recoverable.

The Court: I assume you have a theory of damages you originally——

Mr. Keith (Interposing): I had assumed this was all exclusive of damages, your Honor?

Mr. Lasky: No; it is exclusive of amount—of amount.

The Court: Well, you are still going to have a question of damages, Mr. Lasky.

Mr. Lasky: Oh, well, he claims two types of damages, as I understand it. One was, he had no leasehold interest when his one year expired so he lost a hundred and fifty thousand.

Now, I say whether it is a hundred and fifty thousand or two million, it is not recoverable, because in law he had nothing and we were under no obligation to give him another leasehold. This is what I mean.

Then he says because he could not set his own price during the period of his relationship he lost a thousand dollars. [65] I don't care whether his evidence shows it was a thousand or two or three. I say that kind of damage is not recoverable.

The Court: Well, in your statement of your

case, Mr. Keith, you will set up the basis upon which you claim damages, and your motion for summary judgment can go to both points.

Mr. Lasky: Yes.

The Court: First, your theory that there is no cause of action. Second, if there were, there were no damages which could be allowed.

Mr. Lasky: That's exactly so.

The Court: There is no reason for not disposing of both items when you go up.

Mr. Lasky: Correct. The amount of damages is something we don't go into.

The Court: Just the theory upon which you claim damages.

Mr. Lasky: Now, your Honor desires me to find documents of the character referred to if they exist and turn them over to Mr. Keith prior to his statement of issues?

The Court: Yes. At least start working on them, so that if there is anything in there that adds something to his case, that's in the statement of facts which can be considered by the Court.

Mr. Lasky: Or subtract something from it. [66]

Mr. Keith: Whatever the record shows. It seems to me we each have to have the basic letters about the institution of the program.

Mr. Lasky: You don't need to argue about it. I have promised the Court and I am going to do it.

* * *

[Endorsed]: Filed July 24, 1959. [66-A]

In the United States District Court, Northern District of California, Southern Division

No. 37,344

RICHARD S. SIMPSON,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,

Defendant.

Before: Hon. Lloyd H. Burke, Judge.

MOTION FOR SUMMARY JUDGMENT

February 11, 1960

The Clerk: Simpson vs. Union Oil Company, motion for summary judgment.

Mr. Lasky: Ready.

Mr. Keith: Ready.

Mr. Lasky: Shall we proceed?

The Court: If you will, please.

Mr. Lasky: As the Court knows, this motion is in reality a renewal of the motion for summary judgment once made before Judge Murphy at the time Judge Murphy, in his little order, commenting that plaintiff's case was extremely thin, denied the motion without prejudice to its renewal when the discovery proceedings had wended their way. Since then we have not only had extensive discovery proceedings, we have had pretrial conferences in this Court which have gone a

long way and have served to clarify and sharpen the issues.

Now, I will say and submit that the problem that will confront the Court here is precisely the problem which would confront the Court if we got to trial, and the Court would then have to determine what instructions should be given to the jury because the rules that govern the granting of a motion for summary judgment are the same as the rules that would determine a directed verdict.

I don't think there are any facts in dispute, and upon the basis of the facts we have now clarified we submit that we [2*] should be entitled to a summary judgment. I am not going to go into the background of all of the facts. The Court knows the facts. Some have been developed since the pretrial conference. At one time the plaintiff was in the employ of Union Oil Company. He was a district sales representative, I think the term was. As such he was thoroughly familiar with Union Oil Company's method of doing business. This was developed in his own deposition. He was thoroughly acquainted with its consignment method of doing business. When he came to lease the station from Union Oil Company in May of 1956, after he had been discharged from its employ, he knew that the only way in which he could do business with Union Oil was on their form of lease and by signing a consignment agreement.

We have quoted in the memorandum which has

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

been submitted to the Court, a very thorough memorandum, the quotations from his testimony to that effect.

Your Honor knows he had a one-year lease. Your Honor knows that the lease was renewed; he got a new lease in May of 1957. Your Honor knows that that lease expired by its own terms in May of 1958. Your Honor also knows and it is admitted that some time in April, 1958, he was advised that he would not get a new lease.

For the purposes of this case and as a result of the pretrial conference we now come in and say he got no new lease; they declined to give him a new lease because he had violated [3] the consignment agreement. Heretofore we have said to the Court we would argue the motion, any motion, upon that assumption. Your Honor asked us why we did not waive the other strings to our bow, there were other reasons we did not renew the lease. You said it would simplify the presentation of the case and therefore in the brief we have filed we have said for the purposes of this case we will now take the position we did not give him a new lease because he violated that consignment agreement. It is a conceded fact in the case that he did violate the consignment agreeement because he refused to charge the prices which his principal, the Union Oil Company, prescribed for him to charge.

* * *

He had testified that from time to time he charged whatever prices he saw fit to charge; some-

times above what Union Oil authorized, sometimes below, as he saw fit and in his discretion.

Now, the question, therefore, becomes this: What legal right has plaintiff to damages in this case? [4]

* * *

Now, what is the basis. First we should see the basis upon which plaintiff lays his case. This is a single-party defendant case. The plaintiff has said repeatedly that this is not a conspiracy case. The pretrial conference helped—which we held before your Honor—to focus the issues because the plaintiff said there this, on April 30th of last year, "This is not a conspiracy case, this is a case of the action and the activities of a single defendant. And Mr. Keith also stated at that time just what he said the issues were, and I quote: "I say there are two issues in this case on the issue of liability. No. 1, the consignment agreement is unlawful on its face as a matter of law and this, of course, I would have no objection to presenting in a pretrial form of partial summary judgment." [5]

Then he said, No. 2: "There is a factual question on the issue of whether or not the consignment agreement is coerced on unwilling lessees, this is a factual question * * *"

Then your Honor turned to me and I said: "Upon the factual question I think we can get it eliminated from the case." I said this: "* * * when plaintiff alleges that he was compelled to accept a 1-year lease and he was compelled to accept a consignment agreement does he mean anything more

than this: That if he wanted to get a lease on this property and he wanted to handle Union products and the only type of contract which we would give him by which we would deal with him was a 1-year lease and the consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts; Either he took our consignment contract and our lease or we wouldn't deal with him.

Your Honor turned to Mr. Keith and said: "That is precisely what you mean by the word 'compel'?

"Mr. Keith: This statement is correct.

"The Court: And to the extent that that may be regarded as coercion, you will stipulate to that, is that right, Mr. Lasky?"

I replied: "Why, yes. I don't stipulate it is coercion, but I say these are the facts. [6]

"The Court: If that constitutes coercion——

"Mr. Lasky: Then we coerced him."

So the issue of fact is absent.

* * *

We have since this time taken the plaintiff's deposition and the facts are these: He had been, as I said briefly a moment ago, he had been in our employ. For some reason, somehow he wrecked an automobile. He was let out of our employ but told he could have a lease of one of our stations if he wanted it. He went to Fresno where he wanted to be in business. He saw this location, he said he wanted it. He knew that the only way in which we

would deal with anybody was a 1-year lease and the consignment contract. Let me read to you his own testimony on this. Here is his testimony of his conversation with our representative in Fresno, the man who had the same position in Fresno as Mr. Simpson had formerly occupied with us in the Santa Maria area:

"Well, as I recall our conversation, being two representatives, one to the other, there was some conversation which is such as, 'Do I have to sign this crap,' and so on, and half way jokingly and knowing [7] that I had to. I mean, as near as I can remember that is what it amounted to.

"Q. Can you recall anything else about that conversation respecting the signing of these papers?

"A. No, not especially. It was all cut and dried. I understood it then, and they knew I understood it as far as that is concerned."

So, then, what is the legal issue? Counsel says that when Union Oil Company used a method of selling by consignment it violated the Sherman Antitrust Act. And why? Not because it has been conspiring with anyone else—this is no conspiracy case—but because he says this was a price-fixing scheme. Now, this is the first question, whether consignment selling violates the law. [8]

* * *

The Court: In that regard, Mr. Keith, let's go to one of the points that Mr. Lasky touched upon, and that is just exactly what in the way of factual

issue other than, perhaps the issue of damages, is to be presented to a jury in this case.

Mr. Keith: Your Honor, I think the law is clear. This [55] case is raised by the injury probably even more so than by the violation. Here was a cancellation of a franchise or a lease and a distribution agreement, pursuant to what we assume for this argument, to be an illegal plan. Now, there is no more express statement of injury and damage than in that meeting of the cancellation.

The Court: Well, now, Mr. Keith, that isn't an issue because that is conceded.

Mr. Keith: Well, if that's an issue for the jury then there is no other way to dispose of the case than by a jury trial.

The Court: Now, just wait a minute. Perhaps I haven't made myself clear. What is it that a jury is going to dispose of in the way of factual issues other than the issue of injury and damages? Everything else is no longer in issue. The defendants concede that they cancelled the tenancy of the plaintiff, they conceded that they cancelled it for the reasons alleged in your complaint. They concede that he for a period of time, at least, was not engaged in the operation of a station. So what goes to the jury at the time of trial?

Mr. Keith: I would like to address myself to that point, your Honor. I have filed a 9-page statement. They are admitting the last page within the statement.

Now, this motion for summary judgment which they filed admits only the fact that the consign-

ment program was in effect [56] and that pursuant to its effectuation the lease was not renewed and the consignment agreement was terminated and admits that there were contractual relations between the parties. Now, that's all they have admitted, as far as I can see in these papers for summary judgment. All of the evidence as to interstate commerce, as to the number of retail consignees, as to the purpose and plan and intentions of the defendant in effectuating the program, in the facts as to whether or not this was an enforced requirements contract, all of these issues are nowhere dealt with.

They do not, for instance—I don't know the state of the record whether they are admitting or whether they are contending that the letters that I have attached to my summary statement are going to be disputed or not, just no statement anywhere as to just what they plan to do with these letters which would show on their face that the consignment program was effectuated for the purpose of controlling resale prices.

Now, I think——

The Court: It seems to me that is pretty well conceded at this point.

Mr. Keith: To what extent?

The Court: The defendant comes up with the proposition that whether you like the practice or not it is not an unlawful practice.

Mr. Keith: But, your Honor, they are very vague on that; [57] they do not say or they are not willing to stipulate; if they are willing they can do that right now—are they willing to say that the

purpose and intention of the consignment program as it affects approximately 3,186 retail consignees was for the purpose of controlling, the purpose and intention to control and to fix resale prices?

The Court: Among other things.

Mr. Keith: I don't think we have gone that far yet.

The Court: I think you have conceded that in your argument, haven't you, Mr. Lasky?

Mr. Lasky: There isn't any doubt, if the Court please, that by use of the consignment method we do control prices at which our gasoline is sold to the consigned stations.

The Court: And that's one of the purposes of the consignment policy, isn't it?

Mr. Lasky: Sure.

Mr. Keith: Is that the purpose?

The Court: Well, Mr. Keith, you can't——

Mr. Keith: All right. It's a purpose. All right, so we have that straightened out. Now, what is the situation with respect to whether or not these consignment agreements in effect, the matter of reality under the Sherman Act effectuate a requirements contract whereby Union Oil dealers are unable to buy their gasoline supplies from any other source. I think that under the Richfield Oil case this is a [58] second ground of condemnation of these consignment agreements. They are in effect using their lease, their 1-year lease, and if we assume they use that lease to force these consignment agreements on these dealers, they are also in effect forcing a requirements contract situation where the Union

Oil dealer has no free choice, no freedom in the selection of his gasoline supply.

The Court: I think implicit in the statements made by Mr. Lasky during the course of his presentation this afternoon is the concession that these consignment agreements are designed to provide outlets and exclusive outlets for their gasoline and related products. Is that correct, Mr. Lasky?

Mr. Lasky: I hadn't understood this was an issue in the case. Plaintiff hasn't claimed——

The Court: I am trying to find out just exactly what Mr. Keith feels should go to the jury as a question of fact now, and whether or not it has any particular bearing on the motion at this point will be considered later, but let's find out what is conceded.

Mr. Lasky: We don't concede that we had an exclusive requirement arrangement at all. Now that the matter is raised, I will be glad to present our position when I get the chance, but I hadn't realized that was an issue in the case.

Mr. Keith: Of course there is; I have said it in my—— [59]

Mr. Lasky: All right. I don't want to interrupt his presentation.

Mr. Keith: No; that's all right.

The Court: All right. One of the issues, things that you feel should go to the jury, is whether or not this is an exclusive-type dealership, that the operator of the gasoline station under this consignment agreement and under the 1-year lease is required to use and sell the products which are con-

signed to him by the defendant oil company exclusively?

Mr. Keith: Yes.

The Court: That's one thing which you want to go to the jury. All right.

Mr. Keith: I think I can summarize this, your Honor. I think these are the basic factual contentions. No. 1, that the consignment agreement was originated and that the purpose and intention of the defendant Union Oil Company in originating and effectuating and maintaining the dealer-consignment program was to fix the resale price of gasoline.

The Court: Among other things.

Mr. Keith: Among other things.

No. 2, it was used through the instrumentality of the 1-year lease so that in effect they are tying in a 1-year lease to effectuate a program controlling resale prices.

The Court: The one-year lease and the consignment type of agreement in combination were used to carry out a policy— [60] that was the policy.

Mr. Keith: That there was no free choice, the dealer was not offered: You can either be a purchase and sell dealer or you can be a consignment dealer. This was not offered to the dealer. He was told you have to be a consignment dealer or you will not get any lease extension.

The Court: As I understand it that isn't an issue; the defendant company has not contended that the dealer has any option at all; he either takes

the package deal or he doesn't take the gasoline station.

Mr. Lasky: We have said, for the purpose of this case; we have said so.

The Court: I don't think there is any issue on that.

Mr. Lasky: Now, to talk about controlling the resale price begs the question. It does—the effect of consignment is to control the price at which the product is sold to the consumer. We say it is not a resale price, there has been no sale to the dealer.

Mr. Keith: Then we have the third one, your Honor, the one I just mentioned, that the effect of the consignment agreement and lease arrangement in addition to controlling the resale price of gasoline also effectuated exclusive requirements arrangements on these independent service station dealers, so they did not have a free market, an opportunity to buy gasoline products from other competitive companies. I think that is about [61] it.

The Court: Those are the three things that you have. And two of them are——

Mr. Lasky: (Remarks inaudible to the reporter.)

Mr. Keith: I just mentioned that.

The Court: ——exclusive dealership.

Mr. Lasky: Exclusive dealership. And the other two?

Mr. Keith: Are the purpose and intention to control the resale price of gasoline.

The Court: Well, using the word "resale"——

Mr. Keith: Or the——

The Court: The sale or—what you mean is the sale to the consumer?

Mr. Lasky: Yes; that was one of the purposes.

Mr. Keith: And that it was used without free bargaining, that it was used by the instrumentality of the 1-year lease, there was no free bargaining and——

Mr. Lasky: We have said for the purposes of this case it could be taken that this is the basis upon which we give a man a lease, no other.

Mr. Keith: No; I would like to make one other thing clear. I don't think this is a jury question, I think it is legal, but I think in effect the legal conclusion to be arrived at, if the Court will arrive at a conclusion of law, was in effect that the Union Oil Company was compelling a combination [62] in restraint of trade among the dealers and itself.

I think the leading—the Dr. Miles case and the Frankfort Distilleries case—would make this clear. I think this is a legal conclusion. I don't think it is important for the disposition of this particular case, but I think in effect and this is the allegation of the Federal Trade Commission in the case against Sun Oil Company which directly attacks these consignments as a violation of Section V of the Federal Trade Commission Act, that in effect there was a coerced conspiracy.

Mr. Lasky: That, you say, is a conclusion, legal conclusion you would seek to draw from the rest of the facts?

Mr. Keith: I think so.

Mr. Lasky: Then it is not an issue of fact.

Mr. Keith: I don't think it is dispositive.

The Court: It isn't something I would give to the jury?

Mr. Keith: Well, I think generally these are factual, these are factual issues. Now, if we do have a concession from the defendant, then they do become matters of law.

The Court: I think we have had most of these concessions right along.

Mr. Keith: Frankly, we don't have the extent of concessions compared with my pretrial statement, but I think this will be sufficient. Then I think on those facts plus the admitted fact that the defendant was controlling the retail [63] price of gasoline by this plaintiff, that he was unable to fix his prices in relation to what he felt was a true competitive price automatically raises injuries as a matter of law, and he says so in his deposition. There is no claim the defendant here is denying he was injured, the deposition clearly says that he felt —this is an answer on page 74:

"I would like to have established my own price at all times."

The effect of the retail dealer consignment program on this particular plaintiff was that he was unable to set his own prices by the exercise of his free judgment, which is a right that the antitrust laws give him.

The second effect——

The Court: As an independent dealer, but not as a consignment agent.

Mr. Keith: Well, assuming—yes, assuming this

is not a valid consignment program, assuming that there is a violation of the antitrust laws.

The Court: Well, again we get back to the question as to whether or not if there be a violation of the antitrust laws it necessarily has any effect on the contract.

Mr. Keith: Necessarily, your Honor, because there is no clearer principle, and I am glad your Honor has raised that question because we find in all these pages on damages and injury this talk of contract rights, that you can't force Union [64] to lease its property to anybody that wants the property, we have an absolute right to refuse to deal and set our own prices and that sort of thing. This might be germane on the issue of liability, and that, of course, is their main argument, that they can fix their own prices, but it is not germane on the question of injury and damages, and they are misconstruing the whole idea of an antitrust case. It's not a contract theory, it's a tort theory. We are not coming in here and claiming a breach of contract with the defendant Union Oil Company, we are saying they violated the antitrust laws and because of that violation we were injured and damaged. This is exactly what the Congress says we can do. We can go into the Federal Court and get protection from the Federal Courts and get damages for the violation of the antitrust laws.

It's a tort theory. There is nothing clearer than the most recent case in this field, which is Richfield Oil Corporation vs. Karseal Corporation. [65]

The Court: Tell me this: Now, let's get back to this question. What right do you feel the plaintiff had which was violated by the defendants other than your contended right to sell gasoline at whatever price he saw fit?

Mr. Keith: Just as in the Eastman Kodak case, your Honor. Now here was a distributor of Kodak supplies. The record is not clear as to what kind of a contract he had. Undoubtedly he had some kind of a distribution agreement with Kodak. Kodak was not a monopoly, it was a monopolizer, just as Union Oil Company is a monopolizer in the situation. They cut him off because he was selling supplies of a competitive house, competitor product. The case went to the Supreme Court. The Supreme Court said there was automatic injury in such a situation and we will address ourselves to the question of damages. And there they go into a discussion of the evidence of damage that was offered by the plaintiff, which consisted of establishing gross profits before when he had the Kodak product and after he had the Kodak product, but it was all on the theory, now, of what his profits would have been absent this cancellation.

Now, I don't think anybody would argue that the plaintiff [68] in the Kodak case had a perpetual right to Kodak goods. It did not. What it did have a right in was to be free of a cancellation by a single company for an unlawful purpose. That's exactly what we have here. We have that right to have been free of this cancellation for an unlawful purpose.

The Court: You feel that to be true even though the original status, such as it may have been, was acquired with full knowledge, full acquiescence and all of the terms under which the dealership was established?

Mr. Keith: Of course, your Honor.

The Court: I suggest it may have been so acquired with full knowledge and full acquiescence of all of the terms under which the dealership was established.

Mr. Lasky: Of course, your Honor.

The Court: Isn't that a position that could be offered by any consignee with regard to controls exercised by a consignor?

Mr. Keith: If I was not alleging compulsion here, this might lay some abstract problem at the foot of the case. However, I am alleging compulsion, your Honor, in this particular situation. This fellow worked for Union.

The Court: Isn't there always a compulsion, Mr. Keith——

Mr. Keith: Not this kind.

The Court: When you have a consignee? [69]

Mr. Keith: No.

The Court: Where you enter into an agreement to take goods on consignment, you are under compulsion in the sense that you are using the term: That if you want to do business with the consignor you take the merchandise on his terms and that is the compulsion as I see it, that you are talking about?

Mr. Keith: No.

The Court: There is no compulsion or coercion, however, to take the agreement or operate under it?

Mr. Keith: Well, in this particular situation—let's address ourselves to the facts here—as they pointed out in their affidavits setting forth the deposition, Mr. Simpson had an unfortunate highway accident. He had a few beers before the accident, and up to that time he was a growing representative of Union Oil Company. He was well on his way to——

The Court: It sounds like he was cut down to size in short order.

Mr. Keith: ——to obtaining a very good position with Union Oil Company; as was indicated, he was a district manager. He was asked to plead guilty to this, or it was suggested, I think, advised—by his higher officials to plead guilty, and he pleaded guilty and the next thing he knew he was no longer with Union Oil Company. But they appreciated the plaintiff and wanted him to have something from the company so they said he could have his pick of any Union Oil station [70] in the State of California that was open. So we know that this was a very good station, very good site, and he picked this particular one because it was the best open site in Fresno where his brother happened to be. So we have this very peculiar situation, that as far as this plaintiff was concerned he had the right to pick any station—and the stations——

The Court: Are you alleging that his plea of guilty was a consideration for this agreement?

Mr. Keith: No; I am alleging this: He had a lease to one of the better stations in the chain.

The Court: What he had was an offer by the company to take whatever station he wanted to if he wanted it.

Mr. Keith: Yes.

The Court: And if he didn't want to take it he didn't have to.

Mr. Keith: All right; but he was compelled, in order to lease that station, to take this consignment agreement—in order to lease that station.

The Court: It is the word "compelled" that bothers me a little bit. Is he compelled to take the lease any more than the tenant who goes into an apartment house is compelled to put up a deposit for the next month's garbage, or the next month's telephone bill or the next month's utilities?

Mr. Keith: I would say just as in Eastman Kodak——

The Court: How is it any different from the compulsion [71] that is imposed upon a tenant who wants to rent an apartment and takes it on the conditions imposed by the landlord?

Mr. Keith: It is just in this peculiar circumstance: He was a Union Oil man and he happened to have a good business opportunity, it is just one of those circumstances: He had a good opportunity with the defendant. [72]

The Court: If they wanted to give it to him.

They took the deposition of the plaintiff. He stated under oath he was injured and damaged. We

have to go into all these questions as experts and testimony on this question of injury and damage. I have a motion for production that hasn't been answered——

The Court: Plaintiff's statement that he was injured and damaged is not determinative of that fact. He may have been injured and damaged, or, in the alternative, he may have been disappointed. There is a distinction there.

Mr. Keith: He had to have been. The minute the restraint of trade, the perpetuation of an illegal resale price-fixing combination effectuated this plaintiff by the cancellation of the lease, he was injured as a matter of law. There is no argument to this point; that's where the injury occurred, and at this point the jury determines what the damages are. There is an immediate impact here.

The Court: If we are guided by your statement then there [75] is nothing to go to the jury. If the injury is automatic and must be recognized on the basis of the facts as they now exist in the file——

Mr. Keith: That's right.

The Court: Then the only thing left is a determination by the jury as to the damages which can be attributed to the injury; right?

Mr. Keith: Yes, your Honor.

The Court: Well, then, this is a proper time for a motion for summary judgment, isn't it, to either be denied or granted? If your theory as to the law which automatically requires a finding of injury is correct, then the motion should be denied; but if

you are in error as to the law, then it isn't appropriate.

Mr. Keith: No, only in——

The Court: There are no more facts for you to develop, are there, except insofar as they relate to damages?

Mr. Keith: From my point of view, not from the defendant's point of view. They are claiming there are all these facts on injury and damage. They say there is no dispute of the fact as to injury and damage. I say there is a dispute as to the fact unless——

The Court: Only as to the amount of damages, because you say in the present posture of the case the injury is definitely established, and once the injury is established it [76] leaves only the question of damages in amount to be determined by a jury. Isn't that the only logical conclusion you can reach?

Mr. Keith: You are right, your Honor, and if your Honor desires me to make a motion for summary judgment, I will, but I just don't know how——

The Court: Your motion could be directed only to a partial judgment anyway, and that isn't going to dispose of it.

Mr. Keith: As I say, I don't know the extent to which we would have a record, though. I suppose we could get down to this thing once more. We have got to have some kind of a record which says how many gallons are involved, and how many retail dealers are involved, and a stipulation that there is no dispute as to the letters that I have attached to my pretrial statement.

The Court: No dispute in what respect?

Mr. Keith: That they don't intend to raise rebuttal to the legal intent to be given to these letters.

The Court: Give him the stipulation, Mr. Lasky.

Mr. Lasky: There is no problem. We furnished him the letters; he put them in his pretrial statement and quoted them. We have not challenged them in our motion.

Mr. Keith: I really don't know from their moving papers——

Mr. Lasky: The moving papers show the only things we challenged and where we don't challenge, we go upon that [77] basis.

Mr. Keith: I do feel——

Mr. Lasky: What you quote are documents and they are what you say they are.

Mr. Keith: Your documents—that's right.

Mr. Lasky: From our files, and you got them from us.

Mr. Keith: I believe that violation and injury follow as a matter of law in this case.

The Court: Again—and I am probably at the very least repetitious in this statement—as it stands now in the present posture of this case, if we had a jury in here tomorrow you would expect them to be instructed only on one thing, and that is how much to award by way of damages.

Mr. Keith: How about this third requirement contract situation? I don't want to be——

The Court: I think Mr. Lasky said he was going to answer that. You got the first two, and I think——

Mr. Lasky: I would like to speak on it.

The Court: That has been conceded, hasn't it, the first two points—the purpose of the contract among other things is to control the retail sale price?

Mr. Lasky: We have stated our position on that and I don't see any issue of fact on it.

The Court: And the consignment contract in combination with the lease was to carry out the policy of the defendant [78] oil company insofar as maintaining a price schedule for retail distribution.

Mr. Lasky: This was one of its purposes.

The Court: Those are the first two things you had in mind, Mr. Keith, and I think they are both conceded in sufficiently definite form to eliminate those as issues.

Mr. Keith: Yes.

The Court: All right. Then we get to the third question of exclusive dealings.

Let's hear what Mr. Lasky has to say. Maybe he will concede that, and then we certainly don't have anything left to go to the jury except only the amount of the damages.

Mr. Lasky: It would be an improper issue to let go to the jury for the reason that plaintiff has never claimed any damage flowing from an alleged exclusive requirement. There was no exclusive requirement, if the Court please. Ever since the decision of the United States Supreme Court in U. S. vs. Standard Stations, some years ago, followed by U. S. vs. Richfield, everybody has understood ex-

actly what the Supreme Court said: That you cannot have an arrangement that requires dealers to handle no one else's products. You can require them to handle no one's products if he is your agent. We could have legally done it with a consignment, but we did not.

There is nothing in the consignment contract that requires [79] the plaintiff to take any quantity of gasoline from us or to handle any quantity. What it says is that we will supply to him on consignment and he will handle on consignment as a consignee such amounts of gasoline as the parties from time to time shall determine. That is all it says.

Next there is the affidavit of Mr. Rath, not contradicted, that we never required the man to handle no one else's products.

Now this must be read in conjunction with the requirement of California State law. It is illegal in California for anybody to sell gasoline other than the brand that goes under the color of the pumps through which it comes and under the color of the station, or at least under the color of the pumps. This is the State law which prevents deceit.

This means that any consignee who has taken our station lease with our colors on it and our pumps, if he wants to sell someone else's gasoline would have to put in separate tanks and separate pumps bearing the proper colors of whatever brand he is selling.

Now very few people, although they have the right to do so, see any economic sense in maintaining two separate pumps and two separate tanks.

I could call those State Code citations to your Honor's attention, but they are in the Business and Professions Code.

The point here is that it has never been an issue because [80] the plaintiff has never said that he sustained any damage by virtue of any of the exclusive requirements. He has specified where he was damaged. He has not said that by being required to take our product instead of something else he has been damaged. He has never said he wanted to take anybody else's product and wasn't permitted to do so. He has not said that because he refused to handle our product exclusively, we terminated the lease. Pardon me, we never terminated the lease; we never cancelled. It expired of its own effect and we declined to renew.

He has come in here. He begged me, in effect, to stipulate that the reason we did not renew his lease was because he violated the consignment agreement by not observing the price schedule we placed for the sale of our gasoline, and on that urging I so stated for the purpose of this case.

Now, where does this exclusive requirement element get into this case?

Mr. Keith: On the issue of violation of the antitrust laws.

Mr. Lasky: Well, my gosh, we can violate the antitrust law in 10,000 ways but it won't affect him.

Mr. Keith: We are getting into the disposition of this case.

The Court: Where is the basis for argument as to the exclusive dealing, Mr. Keith? [81]

Mr. Keith: It is a violation of the antitrust laws.

The Court: Where do you find exclusive dealing a requirement in the facts of this case, and if it were an issue, where would you find your evidence to support that contention?

Mr. Keith: I was just going to say this, your Honor: I have interrogatories addressed to this point; I understand the Union Oil Company has virtually complied with all these papers and so on that we were going to get from our last motion for the production of documents. I think they were due yesterday and we had an extension of time on it.

Mr. Lasky: I regretted we didn't have them here today, but they are being signed and sworn to.

Mr. Keith: What I could do is make my motion after we obtain these documents for summary judgment and dispose of the case without trial, if that is what your Honor desires.

On this question of exclusive dealing, it is going to be in these last interrogatories that are due now so that I can dispose of that.

The Court: You mean it will either be admitted in the interrogatories or you will have no additional evidence to establish exclusive dealing?

Mr. Keith: The basic facts, as I say, you get admissions in the trial from the witnesses and so on, but for the purpose of the disposal of this case I would submit it on [82] the answers to the interrogatories addressed to them.

The Court: All right.

Mr. Lasky: That is very well indeed.

The Court: Then I assume the answer to the interrogatories will be in the immediate future, and if they provide you with anything that you think you can use to establish exclusive dealing, you can supplement your memorandum which is now on file.

Mr. Keith: I suppose I could really get a stipulation from Mr. Lasky that in effect—in effect—the practice of the defendant Union Oil Company was not to sell gasoline to stations that offered for sale gasoline of other companies.

Mr. Lasky: No; I won't stipulate to that.

The Court: I don't know that that has anything to do with this particular case.

Mr. Lasky: It isn't true. The fact is that, despite the Supreme Court's decision, split pumps, as they call it—a station that has two different sets of pumps—are practically non-existent anywhere along the Coast because it doesn't make any economic sense. People don't want to be bothered with two different pumps.

Mr. Keith: Or because that is the way all the oil companies do business.

Mr. Lasky: No. [83]

Mr. Keith: As I say, I think it is a vital third part of the case, your Honor; I don't think there is any question about it.

The Court: If you think it is a third part of your case, is it going to be disposed of one way or the other on the answers?

Mr. Lasky: The answers will be in as fast as they are returned to us.

Mr. Keith: Your Honor, I asked them to say if they knew of any station where there was a split-pump situation, and Mr. Haas indicated at the pre-trial there weren't very many.

Mr. Lasky: There aren't very many.

The Court: An answer in the negative isn't going to establish any exclusive dealing.

Mr. Keith: Well, all the papers plus that fact, I think, would raise the judicial conclusion that there was such a policy.

The Court: I don't know. My paper boy only carries one paper and I suppose he has got a good reason for doing that. While it might be a little farfetched, the same general proposition might apply to gasoline. You would have to have two separate tanks, wouldn't you, underground?

Mr. Keith: Well, yes, you would have to have——

The Court: You would have to have two different [84] deliveries?

Mr. Keith: Well, you have this kind of a situation.

The Court: Double pickups.

Mr. Keith: This is all we are asking for in this business: If we don't like defendant Union Oil Company's program or policy, we will deal with another company.

Mr. Lasky: You would have to repaint the whole thing.

Mr. Keith: All right; we will do it.

Mr. Lasky: You can't do that.

Mr. Keith: There is no freedom of selection in this.

The Court: You are still going to get back to whether or not the consignment agreement is a violation of the law?

Mr. Lasky: That is what it gets back to.

The Court: But if this thing is going up for review, I don't want it to go up in pieces; I want every contention that is made by either side available for consideration.

Mr. Lasky: The response that your Honor directed us to give to the motion for production and interrogatories will be here in a day or two, and we agree that it will be part of what your Honor considers in ruling on the motion. [85]

* * *

The Court: In view of the stipulations that you have had this afternoon, which apparently reach every one of the contested issues you have in mind, I think there isn't anything in here in the file that you can't use as the basis for a motion for partial summary judgment.

* * *

[Endorsed]: Filed March 13, 1961. [86]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Before: Hon. Lloyd H. Burke, Judge.

September 16, 1960

The Clerk: Motion for Partial Summary Judgment filed by the plaintiff in Simpson v. Union Oil Company of California, No. 37,344.

Will you state your appearances, please?

Mr. Keith: Maxwell Keith, attorney for the plaintiff. [2*]

* * *

But I believe, in view of the stipulations that we have in this case—and the record as stipulated to by counsel—that we are in a posture that the Court can summarily rule that the retail dealers' consignment program of the defendant Union Oil Company of California is in violation of Sections 1 and 2 of the Sherman Act. That is the issue this afternoon as far as the plaintiff is concerned. [9]

* * *

Mr. Keith: * * * That is as strong a language as we can get on the need for price competition, and if that is strong, then the new Parke-Davis case makes it even stronger, that all you can do on the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

question of enforcing resale price is to announce that you will not do business with somebody, and that is it. You can't talk to anybody, you can't see anybody about it. The minute you do, you are organizing a conspiracy to fix prices which is going to be held illegal per se.

So I think under the Dr. Miles and the Parke-Davis cases that the admission or the stipulation that this agreement in front of the Court was in effect in 3,500 stations makes that agreement or that program, that Retail Dealer's Consignment Program per se illegal under antitrust laws, Sections 1 and 2. [26]

* * *

The Court: Before you go off that point, would you contend that absent the position as lessor, this consignment agreement alone, standing alone, would constitute a violation of the antitrust laws?

Suppose that the defendant company were contacted by an independent dealer who owned the land, owned the station, and sought to become a Richfield dealer and they said, "Well, you can carry our product but we won't sell it to you. We will put it in your tanks on a consignment basis and we will continue to supply you with gasoline for as long a period of time as you observe our price schedule for the sale of our consigned [27] products." There was nothing more than that.

Then he followed his own dictates and doesn't accept the consignment prices, and fixes his own prices, at which point Union refuses to supply gaso-

line to his station from that time forth. Is that a violation?

Mr. Keith: I would say a lot depends on how large this other firm is. If it is a small operator and you are talking about a situation where there is a meeting of the minds, where there is an original desire to be a consignee and that is the only one in operation, and that is all we are talking about, you have a problem. But that is not our case.

The Court: The desire to be a consignee, that is the only basis upon which your gasoline deliveries will be made to this independent owner, and it is just a flat proposition of "You take our price schedules or you don't. If you don't, we are not going to deliver any more gasoline to you"——

Mr. Keith: He has his own station?

The Court: He owns his own station. He can carry any brand of gasoline he wants to. He can do whatever he wants to.

Mr. Keith: Well, the general law, I believe, in this field is that a manufacturer can decline to deal with somebody as long as it is not conspiracy to restraint of trade or a conspiracy to attempt to monopolize, or monopoly conspiracy. You might have a factual case as to whether or not Union Oil was monopolizing in this situation, but that is the rule. [28]

That is the rule in the Radio-Television case.

The Court: I take it your answer, then, is, tentatively, that it wouldn't be a violation of the antitrust laws.

Mr. Keith: No, unless we can show that Union

Oil had sufficient monopoly power to have the probability of monopoly, and this is pursuant to a plan or policy to monopolize.

The Court: They are fixing the resale price of their own products through the device of the consignment sales agreement.

Mr. Keith: It is unlawful for Union Oil to fix this man's price. It would be illegal per se. If they entered into an agreement, that agreement would be illegal per se.

I would think that with their amount of commerce it would be likewise illegal to insist upon this way of doing business. They can't fix this man's prices as a purchaser, potential purchaser.

The Court: From that can I assume that you are not relying necessarily upon the combination of the lease and the consignment agreement, but the consignment agreement alone?

Mr. Keith: I say the consignment agreement as it is now written is shown to be in effect at 3,500 stations per se, which makes it illegal, because you are showing the elimination of competition in prices between 3,500 competitive dealers. That is all you have to have to make out an illegal Sherman Act violation. [29].

The Court: Then the lease cancellation is not important?

Mr. Keith: That is right. These are all alternative theories. You can rest this case on Dr. Miles and Parke-Davis.

Alternatively, you can rest on the Masonite case, which is No. 2, that regardless of whether it is a

valid agreement, that the purpose and effect, as shown by these letters and by the stipulation of counsel, showed it to be nothing more than a retail price-fixing mechanism because the instructions from the Los Angeles head office to the men in the field were: "To establish a price policy of one cent higher than Standard Oil or one cent higher than the other majors."

This is obviously retail price fixing; that is, the purpose and effect of it is to establish a non-competitive price to your competitors without any regard to cost of production, profit, how much oil they are being supplied with. They tell the boys that the price is to be one cent higher than the major competition. This alone is sufficient to bring it under the Masonite case because you are establishing a non-competitive resale price.

The Court: There is no argument about the proposition that if Union had operated this station or all of these stations directly through its own employees, they could fix any price they wanted to?

Mr. Keith: No question about that. The problem here is that, as Judge Yankwich said, you can't create an [30] inde endent businessman's situation for the purposes of taxation, unemployment compensation, on one hand; then when the Sherman Act comes, on the other side say that they are really not independent businessmen; they are agents and we created the market. Having chosen the form of doing business, you are liable for the consequences.

If you say you are putting $100,000,000 into the

station and it is a tremendous investment, then you can make these people your employees and you can control prices. It is your product and you can do anything you want with it, but the minute you say, "We are giving you a lease and it is going to cost you—in this case $3,500—to come into this station and you are going to have all the headaches of taxation and hiring people, doing this and that." When you do that, then you are dealing with independent businessmen.

* * *

[Endorsed]: Filed March 13, 1961. [31]

[Title of District Court and Cause.]

DEPOSITION OF REESE H. TAYLOR

Be It Remembered That, pursuant to notice of taking deposition, and a stipulated continuance, and on Wednesday, January 14th, 1959, commencing at the hour of 1:30 o'clock p.m. of the said day, at the law offices of Brobeck, Phleger & Harrison, 111 Sutter Street, in the City and County of San Francisco, State of California, before me, George H. Wheeler, a Notary Public in and for the County of San Francisco, State of California, personally appeared Reese H. Taylor, a defendant in the above-entitled court and cause, produced as a witness on behalf of the plaintiff therein, under and pursuant to the Federal Rules of Procedure, and who, being by

me first duly sworn, was then and there examined and interrogated by Attorney Maxwell Keith, 111 Sutter Street, San Francisco, California, Counsel for the plaintiff;

And there being no examination nor interrogation by Attorney Moses Lasky or Richard Haas, representing the law firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California, Counsel for the defendants;

And the following proceedings were thereupon had, and the following testimony was thereupon given, to wit: [2*]

* * *

REESE H. TAYLOR

a defendant, called as a witness on behalf of the plaintiff under the Federal Rules of Procedure, being first duly sworn, testified as follows:

Examination

By Mr. Keith:

Q. Mr. Taylor, could you please state your name for the record?

A. Reese (spelling) R-e-e-s-e H. Taylor, T-a-y-l-o-r.

Q. What is your address, sir?

A. Union Oil Center, Los Angeles 17.

Q. That is your business address, I assume?

A. Right.

Q. And how about your home address?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Reese H. Taylor.)

A. 1255 Shenandoah Road, San Marino, California.

Q. Mr. Taylor, what is your present occupation?

A. I am chairman of the board of directors of the Union Oil Company of California.

Q. How long have you held that position, sir?

A. About a little over two years.

Q. In these last two years have you held any other position in the Union Oil Company?

A. I have been a director and a member of the executive committee. [6]

* * *

Q. Does the executive committee pass on the retail dealer consignment program of Union Oil Company?

A. They approve the thing as a matter of policy but they do not implement it or supervise the manner in which it is carried out. [7]

* * *

Q. Do you recall specifically if in 1955 there was a change in the retail dealer pricing policy in the Union Oil Company?

A. No; I don't recall specifically when any of those things took place.

Q. Well, you recall that Union Oil Company went on a consignment program, do you not?

A. Yes.

Q. You can't recall the exact time? You do re-

(Deposition of Reese H. Taylor.)

call that this change was to place Union Oil Company lessees and dealers on a consignment method of retailing your petroleum products?

A. That's right.

Q. Now, do you recall specifically this discussion that——

Mr. Lasky: Pardon me. You talk about petroleum products. You are referring to all types of products, or only gasoline?

Q. (By Mr. Keith): Gasoline and oil.

A. You refer, I presume you meant gasoline dealers?

Q. Gasoline; let's limit it to gasoline. The question may be understood.

A. Service station dealers?

Mr. Lasky: In other words, your question and the answers are understood to relate to gasoline?

Mr. Keith: Yes.

Mr. Lasky: All right; very good. [8]

Q. (By Mr. Keith): You recall now, Mr. Taylor, the discussions that were held with respect to the retail dealer consignment program?

A. Only in a very general way.

Q. What do you recall?

A. Well, I recall that we felt that we had built many of these service stations, or taken on financial obligations in the way of leases and rentals and so forth, and in order to find and market an outlet for the gasoline that our refineries produced, that we also had built them in such a way as to serve the public properly both as to location and type

(Deposition of Reese H. Taylor.)

and kind of facilities that we wanted to ensure those facilities would be well kept up, would be well manned, kept open a sufficient number of hours to assure the proper gallonage through them and that we recognized that the dealer would have to have a commission that would be large enough to enable him to carry on the proper operation.

And that to accomplish all of those objectives this consignment policy was probably the most desirable in the public interest and the dealer interest, and in the employees' and stockholders' interest, of the company.

Q. Now, at the time these matters were discussed—that is, the original discussion of whether or not Union Oil Company would enter into a consignment type of operation with respect to gasoline—what positions or titles did you then hold in the Union Oil Company? [9]

* * *

Q. Well, as a member of the executive committee it was your function, was it not, Mr. Taylor, to know about and discuss marketing programs?

A. Yes, marketing programs. But not the implementation and details of marketing management; two separate and distinct things. [20]

* * *

Q. And with respect to the retail dealer consignment program would the vice president in charge of marketing go ahead and initiate that program independently, without any discussion with you?

(Deposition of Reese H. Taylor.)

A. Well, certainly; it is his responsibility once a corporate policy has been approved.

* * *

Q. What is your understanding of the retail dealer consignment policy of—or program, of Union Oil Company? [27]

A. Well, I understand that the gasoline that is delivered into the dealers' tanks is the property of the company until such time as the dealer has sold it. At which time he is allowed a commission for the sale of the gasoline. [28]

* * *

Q. Does the Union Oil Company hold an ownership interest in any other corporation or company or entity which produces, distributes or retails petroleum products? A. Yes.

Q. What are those companies? [35]

* * *

Q. (By Mr. Keith): What are the names of those companies, Mr. Taylor?

A. Now, your first question was a broad one. Now, as I understand your second question, you want to know what companies we have an interest in, who are engaged in retail marketing of gasoline?

Q. Directly or indirectly, yes.

A. There is only one that I know of.

Q. What company is that? [36]

A. Beg pardon?

(Deposition of Reese H. Taylor.)

Q. What company is that?

A. Westways. I don't know whether it is Oil Company or Petroleum Company, to tell you the truth; one or the other.

Q. They retail gasoline?

A. They distribute to retailers, operate some stations under leases and so forth; various types of retail operations, yes.

Q. Do they, do the Westway oil stations generally set the price below a normal retail price?

A. They usually set their price on a competitive basis with competition in the market, whatever they may be marketing.

Q. Is the gasoline retailed as Westways Oil, or Westway Gasoline?

A. I believe that is the name.

Q. Do you know whether or not the price of Westway Gasoline is generally higher or lower than the Union Oil Company consignment price or authorized consignment price?

Mr. Lasky: The question is: Do you know? Yes or no.

The Witness: Would you state the question again, please?

(Pending question read by the reporter.)

The Witness: No; I don't.

Q. (By Mr. Keith): You have no idea on that?

A. No.

Q. Did you ever make any study of that?

A. No.

(Deposition of Reese H. Taylor.)

Q. Doesn't Union Oil Company have some interest in Wilshire Oil Company? A. No.

Q. Or Pontiac Refining Company?

A. No. [37]

Q. Is it true for the period of 1955 to 1958?

A. Yes.

Q. Union Oil Company had no interest direct or indirect in Wilshire Oil Company or Pontiac Refining Company?

A. That is correct; we have no interest in either.

Q. How about contracts with Wilshire Oil Company?

Mr. Lasky: What is the question, please?

Mr. Keith: How about contracts with——

Mr. Lasky: I don't understand the question, "How about contracts."

Mr. Keith: Distribution contracts, any contractual relation with the party known as Wilshire Oil Company or Corporation.

Mr. Lasky: You're asking the witness whether Union Oil Company has contracts——

Mr. Keith: Contractual relations with Wilshire.

The Witness: Well, we have exchange agreements with almost everybody in the oil business. Might be some with Wilshire, I don't know. Those are more or less everyday operating matters.

Q. (By Mr. Keith): Do you have any knowledge or information as to who does own Wilshire?

A. No, I don't know.

Q. Does Gulf Oil Company have any direct or indirect interest in Union Oil Company? [38]

(Deposition of Reese H. Taylor.)

* * *

Q. (By Mr. Keith): Does Union Oil Company have any—does Gulf have any stock ownership in Union Oil? A. Not to my knowledge.

Q. Do they own a substantial amount of debentures of Union Oil Company? A. Yes.

Q. What is that amount? A. $120,000,000.

Q. Approximately when were those debentures purchased, do you know, Mr. Taylor?

A. Oh, let's see * * * two years ago, I believe it was two or two and a half years ago. I don't remember exactly. All those things [39] are a matter of record, easily determined.

Q. Is there any member of Gulf Oil Company on any committee or on—any committee of Union Oil Company?

Mr. Lasky: What do you mean by "member of Gulf Oil Company"?

Mr. Keith: Any officer or employee or agent of Gulf Oil Company present at any committee meetings of Union Oil Company.

The Witness: No. [40]

* * *

Q. Well, thank you. Was it, or is it a fact, that the record shows in this case that Union Oil Company entered into leases for a period of one year, with service station lessees, as a matter of decision by the executive committee?

A. No. I think that was the marketing department's decision. [48]

(Deposition of Reese H. Taylor.)

* * *

Q. (By Mr. Keith): Do you have any knowledge or information whether or not it was policy of Union Oil Company to terminate or refuse to renew the leases of service station dealers who did not follow the consignment price of gasoline as authorized by the Union Oil Company?

Mr. Lasky: You mean terminating leases of the consignee?

Mr. Keith: Leases of service station dealers who were consignees of the service——

Mr. Lasky: The question is, whether he knows?

Q. (By Mr. Keith): Yes. A. Terminate?

Q. Terminate, or refuse to renew the leases of service station lessees who were consignee dealers of Union Oil Company? [72]

A. Well, any of the—any consignee or lessee of the Union Oil Company who did not meet our requirements as to operation of the station, presumably his lease would not be extended.

Q. And if he did abide by the policy of the Union Oil Company would his lease then be extended? A. With—you mean all policies?

Q. Yes, all policies.

A. If in every way he was a satisfactory dealer, certainly I think his lease would be extended.

Q. It is the ordinary business policy of Union Oil Company to renew leases after the one-year period has elapsed, when a dealer has complied with all the requirements of Union Oil Company in running the station?

(Deposition of Reese H. Taylor.)

A. I would say that would be the general policy.

Q. Does the Union Oil Company have any policy against preventing a Union Oil Company dealer who continually follows all the requirements of Union Oil Company, to continue at the lessor's service station site as long as he observed all the Union Company policies?

Mr. Lasky: I don't understand that question.

Q. (By Mr. Keith): What I'm trying to say, is this, Mr. Taylor: Any objection to a service station dealer staying on a piece of property as long as he continues to abide by all the requirement policies of Union Oil Company? You don't have any time limitations?

A. Including the terms of the lease, and so forth?

Q. Yes? A. No; that's right. [73]

Q. No time limitation upon which a dealer will not obtain a lease renewal, such as a man could be in a station ten years or twenty years or twenty-five years, as long as he abides by the policies and determination——

A. Might be. We have had dealers been with us much longer than that. [74]

* * *

Q. Was it the policy of Union Oil Company, to your knowledge, Mr. Taylor, not to enter into renewal leases with Union Oil Company lessees who did not agree to sign a retail dealer consignment agreement?

(Deposition of Reese H. Taylor.)

A. I can't say as to that. I—I don't know. [77]

* * *

Q. (By Mr. Keith): Was the subject matter discussed, what to do with a retail dealer lessee who refused to sign the consignment agreement?

A. No, that particular matter I do not recall being discussed in the executive committee.

Q. Wasn't this the major problem facing the executive committee? A. No. [78]

* * *

[Endorsed]: Filed June 5, 1959.

[Title of District Court and Cause.]

September 9, 1959

DEPOSITION OF RICHARD S. SIMPSON

* * *

Q. Now you have brought with you, as I understand it, the business records that you maintained which reflect your operation of the Union Oil Service Station of which you were formerly a lessee?

A. Yes, they are there.

Mr. Keith: If you want something in particular, Dick——

Mr. Haas: Let the record show that there has been produced a number of files. There is a file which is styled business analysis for Richard Simpson, month of May, 1956, and I will ask that that be

(Deposition of Richard S. Simpson.)

marked 14-A. The next file bears the same title for the month of June, 1956, and I will ask that that be marked 14-B. The next file, same title, month of July, 1956, and I will ask that that be marked 14-C. The next file, same title, for the month of August, 1956, I will ask that that be marked 14-D. Next file has the same title for the month of September, 1956, I will ask that that be [19*] marked 14-E. Next file, same title, for the month of October, 1956, I will ask it be marked 14-F. Next file same title for the month of November, 1956, 14-G. The next file, the same title, for the month of December, 1956 I will ask that the file marked 14-H. Next file is the same title, for the month of January, 1957, 14-I. Next file same title, for the month of February, 1957, 14-J. Next file same title for the month of March, 1957, 14-K. Now each of Exhibits 14-A to 14-K is in a binder on the front of which appears Frank Henry, business management service, Fresno, California. The next file bears on its cover profit and loss summary, Dick Simpson, month of April, 1957, and I will ask that that be marked 14-L. The next file, same title, for the month of May, 1957, 14-M. The next file, same title, for the month of June, 1957, 14-N. The next file, same title, for the month of July, 1957, 14-O. Next file, same title, for the month of August, 1957, 14-P. The next file, same title, for the month of September, 1957, 14-Q. The next file, same title, for the month of October, 1957, 14-R. The next file,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Richard S. Simpson.)

same title for the month of November, 1957, 14-S. The next file, same title, for the month of December, 1957, 14-T. The next file, same title, January, 1958, 14-U. Next file, same title, for the month of February, 1958, 14-V. Next file, same title, for the month of March, 1958, 14-W.

Now I understand, Mr. Keith, that there are comparable [20] reports for the month of May, 1958, and June, 1958, but you have not located them?

Mr. Keith: I can't seem to find the one for June, but there is one for May.

Mr. Haas: If you do find it will you produce it?

Mr. Keith: Certainly.

Mr. Haas: Now on the files on and after April, 1957, are in a jacket which bears its date in each case, the words Bob Jack, J-a-c-k, management service, 1925 Belmont Avenue, Fresno, California.

(Offers received and marked Defendant's Exhibits 14-A through 14-W inclusive for identification.)

Q. (By Mr. Haas): Mr. Simpson, are the files that have been marked with the No. 14, and these alphabetical designations, -A to -W, the business records that your maintained reflecting the operations of the Union Oil Service Station of which you were formerly a lessee for the period May, 1956 to April, through April, 1958? A. Yes. [21]

• • •

Q. (By Mr. Haas): Have you brought with you, Mr. Simpson, the business records that you

(Deposition of Richard S. Simpson.)

have relating to the General Petroleum station of which you are now the lessee? A. Yes.

Q. And are they in that Pennzoil box over there? A. Yes.

Q. May I see those, Mr. Keith? The witness has produced a group of files each of which is bound in a cover with Bob Jack, management service on the outside. They are each entitled profit and loss summary for the name Dick and Bill. The first file is for the month of July—31, 1958, and let's have that marked 21-A. The next one is for August, 21-B. I should say August, 1958. The next one is September, 1958, 21-C. The next one is October, 1958, 21-D. The next one is November, 1958, 21-E. The next one is December, 1958, 21-F. The next one is January, 1959, 21-G. The next one is February, 1959, 21-H. The next one is March, 1959, [37] 21-I. The next one is April, 1959, 21-J. The next one is May, 1959, 21-K. The next one is June, 1959, 21-L, and the last one is July, 1959, 21-M.

(Offers received and marked Defendant's Exhibits 21-A through 21-M, inclusive, for identification.) [38]

* * *

Q. He didn't tell you what—why it was that the agreement, why he wished to have you sign the agreements up with the dealers, is that it?

A. No; not that I recall. He just told me they had to be signed.

(Deposition of Richard S. Simpson.)

Q. But he did tell you how the agreement was supposed to work? A. Yes. [52]

* * *

Q. Did they tell you about any other service stations besides Tenth and Ventura?

A. They mentioned one on the highway. They mentioned that it has been committed, that they couldn't give me that one, that the only other one that they considered good that was open was this one. [61]

* * *

Q. And the equipment that is included in that $3,200 is what?

A. Well, that was your lubrication equipment, and on that particular station there was an overhead attachment [67] for washing cars, an outside attachment for greasing trucks. Without the old inventory I couldn't name it off, impact wrench, various tools.

Q. Now, was all this equipment included in the conditional sales contract that you entered into with the Union Oil Company?

A. I don't recall. I don't believe all items were included. It was the amount that was needed, I think came to, I say around $1,400 some-odd dollars. I don't recall the exact amount of the conditional sales contract.

Q. Was any of the inventory included in the conditional sales contract? A. No.

(Deposition of Richard S. Simpson.)

Q. That is, the conditional sales contract was limited to equipment? A. Yes. [68]

* * *

Q. I see. Now, did you borrow the rest of this money to pay Gregorian? By the rest of the money, the part the Union Oil Company didn't lend you?

A. I had money of my own. I did borrow $2,000 more.

Q. That was from some local bank?

A. That is true.

Q. What bank is that?

A. That was the First National Bank of Los Angeles at Orange and Ventura. [69]

* * *

Q. My question is whether any of this $1,000 alleged damage that is referred to in this paragraph of the complaint was allegedly suffered by you during the term of this first lease, the period May 23 to May 22, 1957? A. Yes.

Q. How much?

A. I would estimate roughly half of it.

Q. Half of it, that is an estimate?

(Witness nods head.)

Mr. Keith: That is what your question said, an estimate.

Mr. Haas: That isn't what the record said. But we can read the record if you want.

(Deposition of Richard S. Simpson.)

Q. Tell me how that $500 is computed, Mr. Simpson.

Mr. Keith: He didn't say $500. He said approximately half as an estimate.

Q. (By Mr. Haas): Whatever the witness has estimated, as I understand it is $500, is that correct?

Mr. Keith: That wasn't his answer. He said approximately half as an estimate.

Q. (By Mr. Haas): How was it computed, Mr. Simpson? [71]

A. Well, had I been able to set my own price I could have charged for the services that I give that were above and beyond what I believe the average service station service is to be, and the people would have been willing to pay for those extra services, and the fact that they could have gone in a service station that they could trust in the long run and probably save money, as well as get the service they weren't able to get at another station that charged the same amount of money.

Q. Do you mean but for some arrangement you had with the Union Oil Company that you would have charged more for services?

A. That is true.

Q. For instance, your lubrication service?

A. Not necessarily, not specifically naming any one item other than gasoline. I mean gasoline is your major item in a service station, and you sell more of it than you do anything else. Half a cent a gallon or a cent a gallon on gasoline can make

(Deposition of Richard S. Simpson.)

the difference between making money in the service station or just working like a dog for a living. [72]

* * *

Q. I notice in paragraph 2 of the amended complaint, Mr. Simpson, the allegation: "There are directly competitive to the service station leased by plaintiff three service stations which sell the products of Standard Oil Company, Tidewater Associated Oil Company and Richfield Oil Company."

A. Yes.

Q. What is the address of the Standard Oil Company that is referred to there?

A. It is Ventura and Cedar. I don't know the number.

Q. Ventura and Cedar? A. Yes.

Q. Where was it with respect to your Union Station?

A. Two blocks from my service station, east of my service station.

Q. On the other side of the street?

A. Correct.

Q. And the Tidewater Station was where?

A. Was half a block or two-thirds of a block. It was in the middle of the block east of my service station on the other side.

Q. Half a block up on the other side?

A. Two-thirds of a block.

Q. And where is the Richfield Station?

A. Directly across from mine. Not directly, just slightly angled.

(Deposition of Richard S. Simpson.)

Q. This Standard Oil Company Station referred to here, was that a Chevron Station?

A. It was.

Q. And was the Tidewater Station a dealer-operated [78] station?

A. It was two parties.

Q. It wasn't a company-operated station by employees of the Tidewater Oil Company?

A. No.

Q. Was the Richfield Oil Company station a dealer station?

A. It was also a two-party deal.

Q. But it was a dealer, it was not company-operated?

A. No; it was not company-operated.

Q. Do you know what the Chevron Station was charging for gasoline during the months of May and June, 1956?

A. I don't recall at this time.

Q. You used to look at them from time to time, didn't you? A. Oh, yes.

Q. Do you recall what the Tidewater Station was charging for gasoline during May and June of '56? A. No; I do not.

Q. You used to look at that station from time to time, too? A. I did.

Q. Do you know what the Richfield Station was charging in May and June of '56? A. No.

Q. You used to look at them, too?

A. I did. [79]

* * *

(Deposition of Richard S. Simpson.)

Q. I am sure your attorney doesn't want you to characterize whether something is serious or not. But would you just tell me, please, what was said between you and Mr. Pinochi on your first discussion with him in June of 1956?

A. I don't recall what the exact discussion was at all. On numerous occasions there was mention of the fact that I didn't have the margin that I thought was needed and necessary. But, oh, other than that I don't recall.

Mr. Keith: By margin you mean the difference between the retail price of the gasoline and the consigned price? A. My margin. [80]

* * *

Q. What are those factors, Mr. Simpson?

A. Price signs, services, I feel that I still could have charged a half a cent more than what I was told to charge by the Union Oil Company in this particular case and still held the customers, even with the price signs up.

Q. Now, did you put out a price sign on the 12th of September?

A. I don't recall exactly.

Q. 1956. Did your competitors across the street put out price signs?

A. I don't recall. I believe that the price signs were up, but I can't answer that accurately.

Q. I see.

A. Because obviously it had just started then.

Q. Now at any time during the month of Sep-

(Deposition of Richard S. Simpson.)

tember did you have any discussions, September, 1956, did you have any discussion with Mr. Pinochi about the retail prices you [89] were charging?

A. Yes; there was several during September.

Q. All at the station?

A. Yes; I had several, two or three.

Q. Anyone else at these conversations besides yourself and Mr. Pinochi?

A. I don't think, as I recall—Mr. Mealiffe made a call at my station, but I don't recall what date it was or what month it was, either.

Q. What was said by you to Mr. Pinochi and by Mr. Pinochi to you?

A. More of the same.

Q. That is, you said you wanted a greater commission? A. More profit.

Q. Did you tell Mr. Pinochi that you wanted to charge higher prices than the prices that you were authorized to charge?

A. No; I don't recall that I did. Again I say I preferred them to take it off the other end, reduce the wholesale.

Q. You don't yet recall any conversation with Mr. Pinochi, I mean by yet, up to the period of time we have covered, in which you told him what you wanted to do, was charge higher prices for gasoline, and what you wanted him to do was charge lower prices, wholesale prices?

A. Yes; you could leave the price the same and still give me a bigger margin. The retail prices could be the same.

(Deposition of Richard S. Simpson.)

Q. Do you recall, do you know that it was in September of 1956 that you executed the document which has been marked [90] Exhibit 7?

A. Yes.

Q. Mr. Pinochi presented that to you?

A. I don't recall whether I got that in the mail or he gave it to me.

Q. Do you recall having had any conversation with any representative of the Union Oil Company respecting the document that has been marked Exhibit 7?

A. Is there a difference in that one and the other in the commission rate?

Q. That is correct, Mr. Simpson, increase the existing rate?

A. They were very happy to inform us that we were given, I think it was eight-tenths of a cent, I believe, on one grade increase. I have forgotten the exact amount. We were awarded the increase in commission at that time on one grade of gasoline. However, as I recall, it did not involve the premium grade.

Q. You can't recall, Mr. Simpson?

A. I am quite sure.

Mr. Keith: Doesn't the document show it?

Mr. Haas: The document speaks for itself, Mr. Keith, but comparing this document with the original consignment, it is apparent what the document did. My recollection is that it increased the commission to the dealers either outright or a guaranteed minimum commission.

(Deposition of Richard S. Simpson.)

Q. But as I recall it was on one grade only, not on the premium brand. [91]

* * *

Q. And on the 15th of October did you reduce the price still further?

Mr. Keith: Object to the characterizing of the document there.

Mr. Haas: I am asking the question.

A. I was told over the phone to reduce the price, as I recall.

Q. (By Mr. Haas): Who told you that?

A. I believe it was Pinochi called from the Union Oil office.

Q. Starting in October 16, what price did you then charge through starting October 15 and October 16 and October 17, 1957, what price did you charge?

A. 28.9 house brand and 33.4 premium.

Q. And then on October 18, 1956, did you increase the price?

A. Yes; went back to 34.9 and 29.9.

Q. And that continued throughout the balance of October, those prices, is that correct?

A. Yes.

Q. And was this price war that you have referred to in progress continuously throughout October, 1956?

A. As I recall, yes. The price certainly indicates that it was. [92]

* * *

(Deposition of Richard S. Simpson.)

Mr. Haas: I just want to know whether the witness suffered any damage in the month of October, 1956, which forms a part of this alleged $1,000. He says, yes, half a cent on ethyl, that is his portion. Now I want to know what the other is.

Mr. Keith: That is an estimate.

Mr. Haas: I want to know what the other portion is.

Mr. Keith: I don't want you to mislead the witness.

A. I try to explain that in this matter. I mean that I am busy. The phone rings and the man tells me to put my price down. I hadn't noticed any reduction in business, there is no question I wouldn't have had my price lowered until there would have been some obvious effect in my business. You don't need to sell something cheaper than you have to until you find a need for it in my business.

Q. (By Mr. Haas): And you would have despite your higher price continued to sell the same amount of gasoline, is that what your opinion is?

A. Until such time that I did not, I probably would have kept my price where I would have made a margin that was livable, until one overbalances the other, then I would have made a change. [95]

* * *

Q. (By Mr. Haas): What were your competitors across the street doing in this price war, Mr. Simpson? I mean the price war of October, September and October, 1956?

(Deposition of Richard S. Simpson.)

A. At that particular time I don't recall exactly.

Q. You don't recall?

A. Their posting their house brand as I recall were the same at that time.

Q. The same as what?

A. As our posting, 29.9, or [96] whatever that figure was that we had here a minute ago.

Q. Then went to 28.9, did it?

A. As I recall the house brand posting was the same at that time. But there was a difference in the premium price between mine and my competitors. I don't recall the exact amount.

Q. Are you talking now about the Chevron Station only we previously identified?

A. No. As I recall there was a difference in each case. I don't think that any of the three were exactly the same price at that time in their premium grade.

Q. Between the three of them, they were all different on their premium grade, is that your recollection?

A. At that particular time I believe that was the case.

Q. Or were they higher or lower than the premium price you were charging or were some lower and some higher?

A. I believe in each case they were higher.

Q. Did you report that fact to Mr. Mealiffe?

A. I did not. [97]

* * *

(Deposition of Richard S. Simpson.)

Q. Let me ask you this, Mr. Simpson, when did you come to the conclusion that what you needed to successfully operate your station or operate it the way you wanted to have it, when did you first come to the conclusion that what you wanted was a six-cent gross commission?

A. After I found out what my operation was doing. Every service station is different. One fellow can take one gross and make it fine, where another one can't; can't, because of the difference in gallonage.

Q. Are there service station dealers who operate successfully on less than a six-cent net margin?

A. There undoubtedly are, and there are some that couldn't operate successfully on a six-cent margin. It would depend on the location and the gallonage and the amount of service.

Q. You mean by service, you mean lubes and washing and that sort of thing?

A. Accessories, lubes, tubes and [98] T.B.A., as I refer to them.

Q. That is, if your T.B.A. sales are big, you can afford to have a smaller profit on the gasoline and still get along, is that true?

Mr. Keith: Are you asking a question?

Mr. Haas: Asking a question; pardon me. You say that is true, then the answer ran off and I didn't hear the rest of it. Would you read it to me, please, Mr. Reporter?

(Record read.)

(Deposition of Richard S. Simpson.)

Q. (By Mr. Haas): The reporter missed the last part of your answer, Mr. Simpson. You said that is true, that is why I something——

A. Well, what I started to say was that is why I—a cutrate station can operate on a smaller margin they have large T.B.A., because they sell everything that a hardware does.

Q. Now, was it about this time and by this time I mean October of '56 that you had a conversation with Mr. Mealiffe respecting retail prices?

A. Some time in there in the fall. I don't recall whether it was October or not.

Q. Was it during this price war that you have referred to?

A. This price war lasted a long time. I think it was in there, yes.

Q. Did this conversation take place at the service station?

A. Yes. Mr. Mealiffe and Mr. Rath both came out and I don't recall whether it was that fall or the [99] next spring.

Q. Don't let me interrupt you, but are you now testifying you don't recall whether it was in the fall or in the following spring?

A. Mr. Mealiffe was there that fall. I don't recall whether Mr. Rath was with him.

Q. At any rate there was one occasion when both Mr. Mealiffe and Mr. Rath were both at the station? A. Yes.

Q. Then was there another occasion when Mr. Mealiffe was there without Mr. Rath?

(Deposition of Richard S. Simpson.)

A. Yes, Mr. Rath came with Mr. Mealiffe I believe the second time.

Q. The second time?

A. Mr. Mealiffe was there.

Q. Let's first of all you tell me about the conversation which I suppose was somewhere in the fall of 1956 during this price war when Mr. Mealiffe alone came in the station. First, will you tell me if anyone was present at the conversation besides yourself and Mr. Mealiffe?

A. I don't recall for sure whether Mr. Pinochi was there or not.

Q. Now, would you tell me what was said by the participants?

A. Was supposedly a social call, as I recall. I don't think he had any specific purpose in coming out other than the usual form to call at a service station once or twice a year. I again requested a larger margin. I recall that there was some conversation along that line.

Q. Did you tell Mr. Mealiffe that you wanted to raise your prices?

A. I don't recall whether I told him that or [100] whether—I think I put it both ways, that the margin was needed in my business, and Union Oil couldn't afford to lower their wholesale, the only way to get it would be to raise the retail. But the margin of the profit is the thing that I was interested in. I have no control over the wholesale price or the retail price. The margin of profit is what was discussed.

(Deposition of Richard S. Simpson.)

Q. Did you tell Mr. Mealiffe what your competitors across the street were—that your competitors across the street were charging more for premium than you were?

A. I believe I did. I don't recall exactly whether I did or not. I believe he told me that they were charging more for their premium brands. I am sure he knew it, whether I told him or Pinochi did——

Q. When you say you are sure he knew it, what makes you say that?

A. Through the conversation, the fact that he was aware of it, when we were talking about it, because I told him or Pinochi, I am not sure.

Q. What did he say on the subject of these competitors charging more, if you recall?

A. I don't recall anything said particularly about the competitors. I think most of our conversation was concerning margin, which he again—nothing he could do about it. It was a policy change that would have to be made in the head office in the Union Oil. Of course he can report his conversations, and that was all he could do. As I recall, it was more or less [101] taking a survey of the field of the different operators at that time.

Q. Did he tell you that?

A. I believe he did, as I recall, that that was more or less his purpose of being around to see from different dealers what they thought they had to have as a margin.

(Deposition of Richard S. Simpson.)

Q. And you told him what you thought you had to have, which was six cents net?

A. As I recall, at that time it was six cents net.

Q. Incidentally, throughout the period of this price war that you have told me about, in October, you were receiving the guaranteed commission, were you not, 6.6 and 7.1?

A. Yes, I cut that down; of course the six-cent margin I was asking for was net.

Q. I understand that. I am talking about gross now, you were receiving the guaranteed commission 6.6 and 7.1? A. 4.6 and 5.1 actual net.

Q. And it didn't make any difference to what price the retail price, to what level, the retail price fell, you still got 6.6, 7.1 gross at that time?

A. Yes. [102]

* * *

Q. (By Mr. Haas): I will show you what has been marked U-1-E-1 and I will ask you if that is your signature. A. I would say it was.

Q. I will call your attention to the words "and will abide thereby," through which has been drawn an ink mark and a little squiggle out at the side. Are these initials yours, "and will abide thereby"?

A. Yes.

Q. Did you strike out those words and initial it at the side?

A. I don't know whether I did or someone else.

Q. But at any rate these are your initials appearing—— A. Yes.

(Deposition of Richard S. Simpson.)

Q. Alongside that delineation?

A. I would say yes.

Q. Do you recall having any conversation with any agent of the Union Oil Company with respect to document U-1-E-1?

A. In respect to the exact document, I don't recall. However, in relation to that document or a document similar to it, I do, yes.

Q. Well, will you tell me what conversation you recall with respect to this document or a similar document? First, will you tell me who you had the conversation with? [111]

A. I believe it was Pinochi.

Q. What date?

A. I believe it was Mr. Pinochi.

Q. And where did that conversation take place?

A. At my service station, as I recall.

Q. And who was present besides you and Mr. Pinochi?

A. To my knowledge there was no other Union Oil man. I believe that my man was there as he usually was.

Q. You mean Bill Spears?

A. However, not directly involved in the conversation.

Q. Will you tell me, did this conversation take place some time around November of 1956?

A. No, I wouldn't say as to that.

Q. Can you give us some idea when the conversation took place?

A. It is confusing because the letters of this

(Deposition of Richard S. Simpson.)

type are very often quite late. I am not saying that this one was, because it may not have been, but some of them were as much as a month or five weeks after the transaction had taken place.

Q. You will notice that U-1-E-1 relates to the price notification effective November 21, 1956, which is Exhibit E, and you will notice further that U-1-E-1 is dated November 2, 1956. Will you tell us what you recall of this conversation with Pinochi?

A. To my best recollection this was in reference to a price which was given and what was posted on my pumps at that particular time. And I objected to the signing of the form with, "will abide by," [112] clause.

Q. That is, at the time you struck out the words, "and will abide thereby," you had posted on your pumps a price different from the price authorized by the price letter, is that it?

A. Whether that was at the exact time this was signed, I could not say, but that was what the conversation was about.

Q. I see. At the time, whenever that was, at the time you had that conversation the prices on your pumps differed from the prices set forth in the price letter?

A. No. What I mean to say was that at the time that this authorization was out, my prices differed, therefore I objected to the signing of the clause in here, "will abide by." This may have happened later.

(Deposition of Richard S. Simpson.)

Q. When you say your prices were different, your prices were different from what?

A. From their order to post. [113]

* * *

Q. Did you at any time before you entered into the second lease say to any Union employee that in your opinion the consignment agreement was illegal? A. I don't recall whether I did or not.

Q. I show you a document that has been marked 4 for identification, being the second one-year lease. Now, was that document presented to you for signature by some representative of the Union Oil Company? A. Yes.

Q. By whom was it so presented?

A. Mr. Pinochi, I believe.

Q. And did you have any discussion with Mr. Pinochi about the lease or about consignment at the time you signed the second one-year lease?

A. I remember that I asked him again if I had to sign the consignment.

Q. In point of fact, Mr. Simpson, there was no consignment agreement presented to you at the time the second one-year lease presented, was there?

A. I am not sure whether the original consignment agreement ran from year to year or whether there was a new one.

Q. Can you tell me everything you remember about the conversation you had with Mr. Pinochi at the time he presented the second one-year lease to you?

(Deposition of Richard S. Simpson.)

A. Will you repeat the question, please? [128]

Q. Will you tell me everything you can remember about the conversation you had with Mr. Pinochi at the time he presented this second one-year lease to you for signature, the document you now hold in your hand?

A. Whether I protested the signing exactly, I don't know; but I know I protested the consignment agreement.

Q. Well, what did you say to him about the consignment agreement?

A. I don't remember the exact words, but that I didn't want it.

Q. Did you tell him that you wanted to go on purchase and sale?

A. I don't remember whether I told him that at that time.

Q. But you told him that at some time?

A. Yes.

Q. And when you told Mr. Pinochi that, what did he say?

A. I don't recall his exact words, but I know that he wasn't able to do anything about it. He wasn't able to say one way or the other at all that I could or couldn't have it without a consignment agreement, but insofar as he was concerned, why, I couldn't. I mean he couldn't see the policy, but then so far as he was concerned, why, I had to be on consignment. [129]

* * *

(Deposition of Richard S. Simpson.)

Q. Were there any other representatives of the Union Oil Company that you had conversations with respecting the consignment agreement other than the three we have just [131] mentioned?

A. Mr. Campbell.

Q. Was Mr. Campbell the retail representative who succeeded Mr. Pinochi? A. He was.

Q. Anyone else?

A. There may have been, I don't recall.

Q. How about Mr. Christopher?

A. Yes; I discussed it with Christopher.

Q. How about Mr. Rath? A. Yes.

Q. Anyone else you can recall? A. No.

Q. Now, how many conversations did you have with Mr. Rath covering any subject matter?

A. Over what period of time?

Q. Over the entire period of time you were a dealer.

A. I believe three, could have been more or less, but to the best of my recollection.

Q. And did all those conversations take place at your service station?

A. Yes; as I recall, they did.

Q. And when was the first such conversation?

A. I don't recall.

Q. Do you recall whether it was before or after you signed the second lease, that is, the lease for the second year? A. I believe before.

Q. Before. And when was the second conversation with Mr. Rath? A. I am not sure.

(Deposition of Richard S. Simpson.)

Q. Was it before or after you signed the second service station lease?

A. I am not sure of that. [132]

Q. When was the third conversation?

A. Whether it was the third or not, I am not sure, but the last time that I saw Mr. Rath was just shortly before I left the service station.

Q. Now referring to your first conversation with Mr. Rath at the service station, which you believe to take place before you signed the second lease, who was present at the conversation besides yourself and Mr. Rath?

A. I believe it was Mr. Mealiffe.

Q. Anyone else?

A. I am not sure, whether Pinochi was there or not, but I don't think so.

Q. Will you tell me what was said by each of the parties in that conversation?

A. I don't recall whether it was the first conversation that we had or not, but the conversation I recall was that they were taking a survey of different stations, they said. That is why they were there, as to what the dealer thought he had to have as a margin to operate a service station. At that time I told Mr. Rath that I, in my opinion, needed six cents margin to operate the service station profitably.

Q. This was after rent?

A. That is correct.

Q. Was that the entire conversation?

A. No. I don't recall the entire conversation, but

(Deposition of Richard S. Simpson.)

that was the essence of the visit and the reason—what we were talking about.

Q. I see. And that is all you can recall, then, of this [133] conversation?

A. That is all at this time.

Q. Was there any conversation at that time with Mr. Rath about the consignment agreement itself, other than what the commission ought to be?

A. I don't recall whether or not I—the subject was brought up at that time or not.

Q. Now your next conversation with Mr. Rath at the service station, can you tell me what you recall about that? First can you tell me who was there besides Rath and yourself?

A. In one of those conversations, as I recall it, it was merely that he and I think Mr. Mealiffe just dropped in to say hello.

Q. Hello, how are you doing and so forth?

A. Yes. One of the conversations, whether it was the previous one while we were talking about the margin or this one, I am not sure concerned—well, it was still margin. It concerned margin, I think it was all on that one there, the conversation was about the margin. And, as I recall, there were only three visits, and I may be wrong, there may have been only two visits, but the one that stands out in my mind is the one where we discussed the margin and the last one.

Q. Now you say you recall having seen Rath just shortly before you left the service station?

A. Yes.

(Deposition of Richard S. Simpson.)

Q. Was that at the service station?

A. It was.

Q. Was he alone, or did he same somebody with him?

A. He was alone.

Q. Did you have a conversation with him then?

A. I did. [134]

Q. And was anyone present besides you and Mr. Rath?

A. Yes.

Q. At the conversation?

A. They were close by.

Q. And who was that that was close by?

A. Bill Spears.

Q. And what did you say to Mr. Rath and what did he say to you?

A. I don't recall the exact words at all, but he came there that day. He had to come around about 4:00 o'clock to get in the place, because it was impossible to get—to come in the front way, and he remarked that they had me pretty well blocked off. They even had saw horses across the street that he came down, and after pleasantries, he wanted to know how I was; he said that he heard that I had planned not to leave the service station when my lease was up, and I said, well, I didn't know where he had heard it, but he said, "Well, you are going to have to leave." I said, well—I said very little. As a matter of fact, Mr. Rath did most of the talking, but I recall that he told me about two dealers down in Los Angeles that had refused to leave, and he said that they had thrown them out bodily, and he said that he, through his past as-

(Deposition of Richard S. Simpson.)

sociations and knowing me, didn't want to see me get hurt. And he also said the Union Oil Company had a lot more money than I did, and that it was foolish for me to try to sue them or anything, because I didn't have the money. And he said, "You are going to go out when your lease is up, within the hour," as I recall, or words to that effect. Immediately, anyway. And I [135] said, "Well, maybe so, but you better keep it legal." And he said, "Whether we do or not, you are going to go out." So that is mainly what I remember about the last conversation.

Q. Anything else you recall?

A. Not at this time.

Q. Was this conversation with Rath that you have just recounted for us after you had received the written notice that your lease would not be renewed? A. Yes.

Q. Now you made reference to the fact of sawhorses in the street, and the street being tore up. There was some road work being done on Ventura Avenue during the time you were the lessee of the station, was there not? A. There was.

Q. And did it begin out to the east of you?

A. It did.

Q. And did it begin on the north side of the street? A. It did.

Q. And did they work down the north side of the street for a while, leaving the south side of the street clear?

A. The word worked is misleading, inasmuch

(Deposition of Richard S. Simpson.)

as they worked both sides of the street up to a point, the whole street certain things were done on the whole street. If you are referring to the repaving, they started on the north side first.

Q. Right. Now, was there a time when the driveway of your competitors on the north side of the street were closed? [136] A. Yes.

Q. And at that time that they were closed your driveway was open?

A. There would be usually one competitor closed at a time.

Q. I see.

A. In other words, access was left as much as possible.

Q. Well, now, the Chevron dealer was the furthest east of you, was he not?

A. There were other dealers farther east.

Q. I am now referring to the three stations that are referred to in your complaint. A. Yes.

Q. Of those three the Chevron dealer was the farthest west? A. Yes.

Q. Was he the first one who had his driveway closed?

A. I do not recall that, because they worked driveways sometimes independently of the actual paving, and would sometimes be closed maybe for an hour or two, and then reopened, but the progression of the street came to his driveway first.

Q. Was there a time when his driveway was closed, and they were working in front of his premises when you were open? A. They were.

(Deposition of Richard S. Simpson.)

Q. And then as they moved west, who was the next of those three dealers?

A. The progression went west, so the next one was Associated.

Q. The Associated dealer. Then do I understand that [137] the Chevron dealer's driveway was opened and the Tidewater's driveway was closed?

A. No; I do not recall it being that way, because they worked strips, and I don't recall that one was open while the other one was closed, or whether both were closed for a portion.

Q. I see. Then was there a time when the Tidewater driveway was closed and yours was open?

A. For a period.

Q. And then they kept coming west to the Richfield Station across the street from you?

A. Yes.

Q. Was there a time when his driveway was closed? A. Yes.

Q. And was there a time when his driveway was closed and your driveway was open?

A. Yes.

Q. Now, can you recall when it was that these competitors across the street were being hindered by this road work?

A. Roughly it was in the fall of the year.

Q. Could it have been in the summer?

A. I really don't recall without checking the records of their construction work exactly when it was. The construction, as I recall, started in September.

Q. And then after they finished across the street,

(Deposition of Richard S. Simpson.)

then they started tearing up the street in front of your station, is that it? A. Yes.

Q. Now, how long was the street in front of your station torn up so as to impede access to the station?

A. Impeding, [138] as I take it, was from the time construction started until it was finished, which it never was finished while I was there.

Q. Was there a time when the driveway into your station was torn up?

A. There were long periods of time when it was torn up.

Q. Was it a week or a month or two months?

A. About four or five months.

Q. When your driveway was torn up?

A. Yes. I mean they were accessible, but torn up.

Q. And when was that, that four or five months' period?

A. It started in the fall, I guess I had that confused with the other side. It was in September. I got out of there in '58, so it was in the fall of '57 and the spring of '58.

Q. That is when your driveway was——

A. Bad.

Q. Torn up? A. Yes.

Q. And the driveways of your competitors were in bad shape prior to September of '57?

A. Yes; that is true. I recollect now from the time that mine was bad. I recall now mine being in the winter when it was raining, consistently and

(Deposition of Richard S. Simpson.)

practically constantly. There was—theirs was in the summer and their period of time was much shorter than mine, their accesses much better than it was when they worked on our side of the street.

Q. During the time you were a Union dealer how many [139] conversations did you have with Mr. Christopher?

A. Just one that I recall at this time.

Q. And when did that take place?

A. That six weeks or two months before, somewhere in there, six weeks or two months before I got out of the station.

Q. And did that take place at the station?

A. Yes.

Q. And was Mr. Christopher alone?

A. No; Mr. Campbell was with him.

Q. And was there anyone present at the conversation besides yourself, Mr. Christopher and Mr. Campbell?

A. Not in the same room. The lube room close by, Bill was there.

Q. Bill Spears? A. Yes.

Q. And what did each of the parties to that conversation say?

A. As I recall, Mr. Christopher came marching in, and I was busy on a lubrication job, with Mr. Campbell, and I left the job and went to talk to them. And after the pleasantries, why, he wanted me to put my price up, is the reason he was there. And I told him that my competitors across the street were posting the same price that I had, and

(Deposition of Richard S. Simpson.)

that I had called his office and had requested from Mr. Campbell to lower the price and I had been refused, and to protect my business, I had lowered the price to meet the competitors' prices on house brand gasoline. And I don't remember the exact words at all, but then they intimated by his actions and words that if I [140] didn't put the price up to where they wanted it, which was two cents above my competitors, that I wouldn't get another lease. And I told them, well, I couldn't help that, if I was going to have to go out of business, why, wasn't any use losing my customers. Earlier they had told me they would meet competitors' prices on the house brand gasoline, and in this particular case they weren't doing it. They said, "Well, it is not the general price of the area," but it was the price that was being posted close to my service station. And therefore it was endangering my business. I refused to put the price back up, and he said that he was going to call Los Angeles and Mr. Rath, and do everything in his power to force me to put the price back up. That is all I recall at this time of the conversation.

Q. At the time of this conversation with Mr. Christopher did your competitors across the street have sidewalk signs out?

A. There were sidewalk signs out. I am not sure about all three of them or not.

Q. Were these sidewalk signs limited to house brand gasoline?

A. As I recall, they were.

(Deposition of Richard S. Simpson.)

Q. And what was the price on these signs of your competitors?

A. Be on the records for those days. To my best knowledge it was 27.9.

Q. For house brand? A. Yes.

Q. And you then put out, when you saw those signs, you put out a price sign for 27.9, is that it?

A. Yes. [141]

Q. And what was the authorized price at that time, for Union house brand at your station?

A. I had called the office for a new authorization and had received, as I recall, a phone authorization for 28.9. And again at that time the prices were changing pretty rapidly, and I believe that there was 28.9 posted by the competitors, and then 27.9. And when I called again for authorization to 27.9, I did not get it.

Q. Then the authorized price was 28.9 for house brand at the time Mr. Christopher was talking to you?

A. The last phone authorization I had received. However, again, as I recall, Mr. Campbell, who I was talking to, had said that they wouldn't authorize 27.9 until Mr. Christopher and he came out there and it was not definite.

Q. And during the course of this conversation did Mr. Christopher authorize the 27.9?

A. He did not.

Q. Indeed he told you that he wanted you to go up to 28.9?

(Deposition of Richard S. Simpson.)

Mr. Keith: Just a minute. Our complaint says 29.9. I think the witness should be told that.

A. Well, they were changing so rapidly in there that actually I think it was a matter of an hour possibly or something like that that this thing was taking place. And I am not sure that this was the instance or not, because during this price war the prices fluctuated sometimes two or three times a day that way on occasion. Now whether [142] this was the time that it did that, I am not positive, but I was at one time, near that time, if it wasn't it, authorized to 28.9. And this particular case it could have been that it was 29.9. I am not sure on that point.

Q. (By Mr. Haas): At any rate you were posting for house brand a price that was not authorized, and that was the subject matter of the conversation with Mr. Christopher? A. Right.

Q. Now at the time of your conversation with Mr. Christopher were you charging the authorized price for premium? A. I don't recall.

Q. Isn't it a fact that when you were talking to Mr. Christopher you had a price out for house brand that was lower than the authorized price, and you were charging a price for premium that was higher than the authorized price? [143]

* * *

Q. (By Mr. Haas): Isn't it a fact when you were talking to Mr. Christopher you had a price posted on your pump, on your premium pumps.

(Deposition of Richard S. Simpson.)

that was higher than the then authorized price for premium gasoline?

A. I don't recall the price that I had at that time, but it could have been possible.

Q. Now, Mr. Simpson, when is the first time when you were a lessee of the Union Service Station that you put a price on either your house brand pumps or your premium pumps which you knew was not the price authorized by Union?

A. I don't recall the first, the exact time.

Q. Well, was it before you executed the second service station lease?

A. I don't recall whether it was or not.

It could have been.

Q. And from that time until you left the service station, from time to time you would put prices on the pumps that you knew were not authorized prices, didn't you?

A. Not in the sense that you are speaking of so far as I am concerned. An authorized price, you are referring to the pamphlets that they sent around. In my mind an authorized price also can be an oral authorization such as, for example, at one time every service station or the majority of service stations in Fresno had a higher price [144] on their pumps than the authorization letters that they carried, and it was known to the retail representatives and to the local office and ignored. To my estimation it was authorized, and they ignored it due to the fact that they made no attempt to change it.

(Deposition of Richard S. Simpson.)

Q. Well, let me define authorized so we will both be talking about the same thing. As I understand your testimony you received price authorizations in three different ways; one was by these written letters of which, for example, 1-J is an example; another way, according to you, was on the consigned gasoline delivery tickets in the block marked authorized retail price; and the third way was from time to time you would phone and ask for an authorization, for someone to give you an authorization for a certain price?

A. We can add the fourth, that is the one that I just mentioned.

Q. All right. Now for the time being let's leave the fourth out of this. Let's talk about specific authorizations, either written or oral. From time to time without such an authorization, either written or oral, you were putting prices on the pumps that were not authorized, isn't that so?

A. The times were not numerous. There were times.

Q. There were times. And when you were putting those prices on the pumps, were the prices that you were putting on higher or lower than the prices authorized? A. Both [145] cases.

Q. And were you arriving at those prices that you were putting on the pumps through the exercise of your own business judgment?

A. Yes. [146]

* * *

(Deposition of Richard S. Simpson.)

Q. How many conversations did you have with Mr. Campbell regarding consignment and the retail prices you were charging?

A. I don't know. [149]

Q. Was it more than one?

A. Yes; it was several.

Q. Several. In any of those conversations with Mr. Campbell was the subject matter the discussion of the fact that you were charging more than the authorized price? A. May have been.

Q. Do you have any recollection?

A. I think you might say that it was in every conversation during the period of time that there was a difference in the price they wanted, and the price I had.

Q. Campbell came on as a retail representative in June of 1957, didn't he?

A. I don't recall the date.

Mr. Keith: What was that date, sir?

Mr. Haas: June, '57. There is an affidavit of Mr. Campbell on file in which he states he became retail representative on June 1, 1957.

Q. Do you recall any particular conversation with Campbell?

A. I think Mr. Campbell was out there three and four times a week very often. Mr. Campbell used to work for me when I worked for the Union Oil Company, and very often he would drop by to no more than pass the time of day.

Q. I see. I am not talking about conversations in which he just socialized or passed the time of

(Deposition of Richard S. Simpson.)

day. I'm talking about conversations which you and Mr. Campbell had, some conversation about consignment or the prices you were charging. Can you recall any specific conversation with [150] Mr. Campbell on those subjects?

A. During the period, this is previous to when Mr. Christopher and Mr. Campbell came out, there were conversations concerning the thing that I recall Mr. Campbell stating that whenever possible, that they would meet competition. I don't recall a conversation concerning, being over their price with Mr. Campbell.

Q. You have no recollection of any such conversation? A. No; not at this time.

Q. Did you have any facility at your Union Station, and by facility I mean truck for delivering large quantities of gasoline to places outside your service station? A. No. [151]

* * *

Q. Right. I notice in paragraph 25 of the amended complaint, Mr. Simpson, it is alleged that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by the defendant, Union Oil Company.

A. I believe that to be about the date, and that brings back a recollection of a conversation with Mr. Campbell that——

Q. Would you tell me about that?

A. That I had forgotten. He is the one that notified me of the fact that the lease would not be

(Deposition of Richard S. Simpson.)

renewed. And at that time I asked him if he had recommended that my lease not be renewed, and he said he had not, that he had recommended that if I would agree to conform with the consignment program, that my lease be renewed. And I asked him if there was any other reason that this lease was not being renewed other than the fact that I had set a price different than they had ordered me to set, and he said there was not. [153]

* * *

Q. Did you from time to time while you were a Union [155] dealer, Mr. Simpson, pay personal property taxes on the property which you owned at the station?

A. There were personal property taxes; however, my veteran's exemption entered into it, and I don't recall whether or not I paid any or [156] not.

* * *

Mr. Keith: Do you have any further questions to ask at this time?

Mr. Haas: Not at this time. The witness is to prepare a schedule showing the detail of the manner in which the alleged $1,000 damage is suffered, and it will be attached and you can furnish that directly to the Notary, and he will attach copies to the original, to the original deposition and copies to such copies as are ordered. I will then examine the transcript and determine whether, on the basis

(Deposition of Richard S. Simpson.)

of that document and examination of these questions, there are any further questions. If there are, we will resume at some place and time convenient to all of us. If not, we will conclude the deposition.

Mr. Keith: Fine.

* * *

[Endorsed]: Filed March 25, 1960. [157]

[Title of District Court and Cause.]

DEPOSITION OF FRED PERRY OLSEN

Be It Remembered, that pursuant to notice of taking deposition, affidavit and subpoena, and on Thursday, May 12th, 1960, commencing at the hour of 10:00 o'clock a.m. of the said day, at the law offices of Stammer, McKnight & Barnum, 501 Equitable Building, in the City of Fresno, County of Fresno, State of California, before me, George H. Wheeler, a Notary Public in and for the County of Fresno, State of California, personally appeared Fred Perry Olsen, a witness in the above-entitled court and cause, produced as a witness on behalf of the plaintiff therein, under and pursuant to the provisions of the Federal Rules of Civil Procedure, who, being by me first duly sworn, was then and there examined and interrogated by Attorney Maxwell Keith, 111 Sutter Street, San Francisco 4, California, Counsel for the plaintiff;

And there also being present Attorney Richard Haas, representing the law firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, Counsel for the defendant Union Oil Company of California;

And there also being present Attorney James Barnum, representing the law firm of Stammer, McKnight & Barnum, Counsel for the witness Fred Perry Olsen;

And the following proceedings were thereupon had, and the following testimony was thereupon given, to wit:

Mr. Keith: Ready to proceed?

Mr. Haas: Yes.

Mr. Keith: This deposition may be signed in the presence of any Notary, as far as I am concerned.

Mr. Haas: So stipulated. [2*]

FRED PERRY OLSEN

a witness, called on behalf of the plaintiff, under the Federal Rules of Civil Procedure, being first duly sworn, testified as follows:

Examination

By Mr. Keith:

Q. Would you state your name, please?

A. Fred P. Olsen, Fred Perry Olsen.

Q. And how do you spell that, o-n- or e-n?

A. E-n.

Q. And what is your address, Mr. Olsen?

A. 511 Suffix, Fresno.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Ered Perry Olsen.)

Q. What is your occupation?

A. Vice president of the Sunland Refining Corporation.

Q. What would your duties include as vice president of Sunland?

A. Vice president in charge of sales, marketing, mainly.

Q. Marketing? A. Yes.

Q. And in—about how long have you been the vice president of Sunland?

A. Approximately a year, I guess.

Q. What was your position or occupation before that? A. General sales manager.

Q. Of Sunland? A. Yes. [3]

Q. How long were you general sales manager?

A. Two or three years, I guess.

Q. And your position before that?

A. Salesman.

Q. For Sunland? A. Uh-huh.

Q. Can you tell us just generally what the business of Sunland Refining Corporation is?

A. Refining and sales of petroleum products.

Q. And do you manufacture your own petroleum?

A. Have a refinery in Bakersfield.

Q. Mr. Olsen, I presume you were served with a subpoena in this, for this deposition, in the action of Richard S. Simpson versus the Union Oil Company of California? A. Yes.

Q. Did you bring with you the documents required in the subpoena? A. I did.

(Deposition of Fred Perry Olsen.)

Q. Could you turn them over to me, sir?

A. Let's see——

Mr. Barnum: They are all in order; don't mix them up.

Q. (By Mr. Keith): Now, you have shown me a document entitled "Gasoline Purchased from Union Oil Company, Los Angeles and Richmond." I would like to have this marked as Plaintiff's Exhibit Number 1 for this deposition. [4]

* * *

Q. I understand, Mr. Olsen, it is a question of clarifying this. What happens to the gasoline that you purchase from Union Oil Company, as set forth in Plaintiff's Exhibit Number 1?

Mr. Haas: Do you mean, what happens to it?

Q. (By Mr. Keith): Yes. What was the ultimate destination of this gasoline that is set forth in Exhibit 1, all this gasoline?

A. Yes; this went to Los Angeles.

Q. You say it is Los Angeles and Richmond, is it not? A. Yes.

Q. I assume that Richmond gasoline does not go to Los Angeles, does it?

A. That's correct. [8]

* * *

Q. (By Mr. Keith): Do you have any knowledge or information, then, as to whether or not Union Oil Company gasoline is delivered into Fresno, California, by Sunland Refining Company?

A. Yes; I do.

(Deposition of Fred Perry Olsen.)

Q. What is your knowledge and information about that? [12]

* * *

Q. What is your knowledge and information?

Mr. Haas: The same objection.

The Witness: 1960, none, 1959, none. 1958, none. And 1957, none. In 1956, none.

Q. (By Mr. Keith): From '56 to '60 no Union Oil Company gasoline was taken by Sunland Refining for delivery to Fresno, California, is that correct? A. To the best of my knowledge.

Q. Have you checked that information out, Mr. Olsen?

A. The specific dates, I am pretty sure of the other——

Q. You have Richmond and Los Angeles listed as refineries where you purchase gasoline from Union Oil Company, is that correct?

A. That's right.

Q. Union Oil Company does have refineries in Bakersfield, too, does it not?

A. Not at present.

Q. Did it, during the period '56 to '60, to your knowledge?

A. I think they closed down around '57; I'm not sure. You [13] could tell them better than——

* * *

Q. Whatever that period of time was, do you know whether or not any of Union Oil Company

(Deposition of Fred Perry Olsen.)

gasoline was picked up at Bakersfield refinery for delivery into Fresno?

Mr. Haas: By Sunland?

Q. (By Mr. Keith): By Sunland Oil Company?

A. I would say definitely not. [14]

* * *

Q. (By Mr. Keith): None of these documents indicate to where the Union Oil Company gasoline was delivered? Now, let me ask you where the gasoline that you show in Plaintiff's Exhibit Number 1 as being purchased from Union Oil Company was delivered?

A. Which one are you talking about?

Q. Plaintiff's Exhibit 1.

A. Yes, I know. Are you talking this (indicating)?

Q. Every item in here. Where were these purchases delivered?

A. All Los Angeles purchases were in the Los Angeles basin. All stuff from your Oleum, or Richmond, refinery, did not go any farther south than Modesto.

Q. Now, do you have any retail outlets in the Los Angeles basin that is Sunland Refining Company? A. Yes.

Q. Do you know whether or not the Union Oil Company has retail outlets in the Los Angeles basin? A. Yes.

Q. Could you just briefly, the best of your recollection at this time, indicate some of the cities and

(Deposition of Fred Perry Olsen.)

towns where Sunland does have retail outlets in the Los Angeles basin? A. Oh——

Mr. Barnum: By "does," you mean now, Mr. Keith?

Q. (By Mr. Keith): Did have, during the period, '56 to '58, as shown in Exhibit 1.

Mr. Barnum: Thank you. [16]

Q. (By Mr. Keith): Would it be virtually every city in the area?

A. No; we are very small. We—I can give you today; I can give you one we had then. I don't know whether that was—Sepulveda Boulevard—this end of town. That's the only one I can tell you of, location.

Q. Do you know if Union Oil Company has any gasoline stations on Sepulveda Boulevard?

A. I imagine they do.

Q. Now, is it fair to say, Mr. Olsen, that every city that you have listed in Plaintiff's Exhibit Number 2, that in every city as listed on Exhibit 2, Sunland has a retail outlet?

A. No; that is not fair to say.

Q. Which ones do not?

A. I can only say as to today.

Q. Well, all right; as of today?

A. Hanford.

Mr. Haas: This is where Sunland does not have a retail outlet?

The Witness: That's right. As of this day.

Q. (By Mr. Keith): Yes. Are you saying at

(Deposition of Fred Perry Olsen.)

one time there might have been a Sunland station in Hanford?

A. Yes; there was a Sunland station in Hanford.

Q. Would it be during this period?

A. No.

Q. Way before?

A. Way, way before. I will say that would be the only place.

Q. Anywhere else there would be a—— [17]

A. Except—this is an area, I don't believe we have a retail outlet.

Q. In Ceres (spelling) C-e-r-e-s?

A. Except Ceres and Hanford.

Q. And as except for Ceres and Hanford you would have retail outlets in all the communities listed? A. Yes.

Q. Do you know whether or not Union Oil Company has retail outlets in these communities?

A. I would imagine so.

Q. Now, if there isn't any written contract between Sunland and Union as to acquisition of petroleum products, exactly how does the—how does the acquisition of Union Oil Company gasoline occur?

Mr. Haas: I'm going to object to that question, as assuming facts not in evidence.

Q. (By Mr. Keith): Well, do you understand the question, Mr. Witness?

A. I believe I do.

Q. Could you tell me?

A. I would like to have you repeat it again.

(Deposition of Fred Perry Olsen.)

Mr. Barnum: As of now, Mr. Keith?

Mr. Keith: I would like it during the period '56 to '58.

Mr. Barnum: You are referring to anything other than the—strike that. That isn't—you understand, that is the question.

Mr. Keith: Pardon me.

The Witness: The only thing we have in our files is that [18] memorandum to Mr. Kohler.

Mr. Barnum: That isn't answering the question. He wants to know——

The Witness: I don't know. I did not handle it.

Q. (By Mr. Keith): Do you have any information, any information about that?

A. Nothing except what I have here.

Q. Do you know whether or not every time Sunland acquires gasoline from Union they will pay the posted tank-wagon price, whether they get the price for—posted tank-wagon price of Union, or whether they have a variation as to price, as to each acquisition? Whether there is a standard price? How exactly does that occur?

Mr. Haas: I'm going to object to that question, as compound and complex. About sixteen different questions.

The Witness: That is pretty complicated.

Mr. Barnum: Off the record here.

(Discussion off the record.)

The Witness: Add nine cents tax. [19]

* * *

(Deposition of Fred Perry Olsen.)

A. I have none.

* * *

Q. (By Mr. Keith): All right. Did the gasoline you acquired from the Union Oil Company refinery in Richmond—I assume that is the Oleum refinery?

A. I assume it is the same.

Q. Did that gasoline go to the Sunland retail outlets in Northern California? A. Yes. [20]

Q. Do you know whether or not any gasoline acquired from Oleum was ever trucked down here to Fresno?

Mr. Haas: By anybody?

Q. (By Mr. Keith): By Sunland Refinery?

A. No.

Q. Pardon me? None? A. No.

Q. This could occur, couldn't it?

Mr. Haas: Anything is possible. Object to the form of the question as calling for a conclusion of the witness.

Q. (By Mr. Keith): Is it unusual to truck gasoline from Oleum to Fresno?

A. Very. [21]

* * *

Q. (By Mr. Keith): You said you had some knowledge and information and I'm asking, what is your knowledge and information?

Mr. Haas: The same objection.

The Witness: We have an exchange—we did have an exchange agreement with Hancock.

(Deposition of Fred Perry Olsen.)

Q. (By Mr. Keith): How did that work out? Just tell me the details of it? [22]

A. I can give you it in a broad way. We picked up Hancock gasoline in other areas for—they picked up Sunland gasoline in—out of our refinery. That broad.

Q. Could you give me the details of it; what areas are you talking about?

A. Both north and south. We pick up from them.

Q. You picked up from them where?

A. North and south. I mean, north and south.

Q. Whereabouts north and south?

A. By area?

Q. The Hancock refinery?

A. Hancock refinery. And north, picked up at the Oleum, or one of their deliveries that was not Hancock gasoline.

Q. You picked up Hancock gasoline where?

A. Up north.

Q. At where? At their refinery in Northern California? A. Yes—which refinery?

Q. That's what I'm trying to find out.

A. They don't have a refinery in Northern California.

Q. You picked up Union Oil Company gasoline?

A. We picked up Hancock gasoline.

Q. Where? A. At Oleum.

Q. Oleum is the Union Oil Company refinery?

A. That's right.

(Deposition of Fred Perry Olsen.)

Q. How did you pick up Hancock gasoline at the Union Oil Company refinery? I don't understand that. [23]

A. We were billed from Hancock; not from Union.

Q. You were billed by Hancock for the pickup of Union Oil gasoline in Oleum?

Mr. Haas: Let the record show the witness is shaking his negatively. Mr. Olsen, you have to answer; you have to speak up. Otherwise the reporter can't get down what you are saying.

The Witness: We picked up Hancock gasoline at Oleum, or their terminal—I think they have one in Richmond. Do you know?

Mr. Haas: I don't know, sir.

The Witness: One of them; I think they do, one of the two places. And it was Hancock gasoline.

Q. (By Mr. Keith): You mean Hancock truck?

A. No; this was—it was an exchange.

Q. Apparently this exchange occurred at the Union Oil refinery?

A. That was between Hancock and Union; not between Sunland and Union.

Q. You picked up the gasoline from the Hancock truck, is it?

Mr. Haas: You are leading the witness, Mr. Keith. That's not his testimony.

Mr. Keith: Look, Dick, I don't understand this. I'm trying to find out.

Mr. Haas: Just ask some questions without leading him.

(Deposition of Fred Perry Olsen.)

Q. (By Mr. Keith): Do you understand, or could you tell me why it is that you picked up Hancock gasoline at a Union Oil Company refinery?

Mr. Haas: Why this was? I'll object to that, the form of [24] that question, as calling for the conclusion of the witness.

Q. (By Mr. Keith): Just do the best you can.

A. That's where Hancock told us to pick it up.

Q. Do you know whether this was Union Oil gasoline?

Mr. Haas: I'll object to that question, as calling for the conclusion of the witness.

The Witness: It was Hancock.

Mr. Haas: And as being unintelligible.

Q. (By Mr. Keith): It was picked up at the Union Oil Company terminal?

A. That's correct.

Q. Where did that gasoline go?

A. Northern California.

Q. To your retail outlets in Northern California? A. Yes.

Q. Sunland retail outlets in Northern California? A. Yes.

Q. Then you said in exchange for that you delivered Sunland Refining Company gasoline to Hancock? Where did that occur? A. Bakersfield.

Q. And do you know where that gasoline went to?

A. (Indicating): ——this gasoline is their gasoline; they do whatever they wish with it.

(Deposition of Fred Perry Olsen.)

Q. Do you know how much gallonage was involved in this transfer? A. No.

Q. Has this occurred periodically, or just one occasion, this transfer or exchange?

A. What do you mean, "one occasion"? [25]

Q. Has this occurred more than once, or just occurred once?

A. You mean one truck-and-trailer load?

Q. No. No. How many times have you worked out this kind of an exchange relationship between Hancock and yourself? A. Only had one.

Q. About when was that?

A. During this period, I imagine. I don't know how long——

Q. All you know about it, is one such transaction?

A. To my knowledge, I would say. I wish you would explain what you mean by "transaction." I don't get it. [26]

* * *

Q. (By Mr. Keith): Do you know whether or not Hancock is a retailer of gasoline?

A. Yes.

Q. And in those areas it retails do you have any knowledge or information as to whether or not it charges higher or lower retail prices than your price?

A. Most cases, approximately the same, I guess.

Q. And those prices are generally—do you know whether or not Union Oil Company retails gasoline?

(Deposition of Fred Perry Olsen.)

A. Retails gasoline?

Q. Yes?

A. Yes, I know they retail gasoline. [27]

* * *

Q. (By Mr. Keith): Sunland refines retail gasoline too, doesn't it?

A. We don't retail Sunland Refining, no.

Q. You sell to retail outlets? A. Yes.

Q. Those retail outlets are called Sunland Stations, are they not?

A. Under the Sunland brand.

Q. Sunland brand? A. Yes.

Q. Do you have any proprietary interest in the Sunland outlets?

Mr. Haas: By that, do you mean lease stations?

Q. (By Mr. Keith): Lease, own?

A. Yes.

Q. So that you retail Sunland gasoline to Sunland stations?

Mr. Haas: I'm going to object to that question, as calling for the conclusion of the witness, and contrary to the witness' testimony that Sunland does not retail gasoline.

The Witness: We don't retail gasoline.

Q. (By Mr. Keith): You sell to retail outlets?

A. Yes.

Q. You sell to retail outlets called Sunland?

A. That's right. [28]

* * *

(Deposition of Fred Perry Olsen.)

Q. Now, do you have any knowledge or information as to the prices charged by Sunland service stations? A. Yes.

Q. And are those prices generally higher or lower than the prices charged by Union Oil Company stations in the same communities that the Sunland stations are located in?

Mr. Haas: Object, as calling for the conclusion of the witness. And the question is without foundation.

The Witness: Lower. [30]

Q. Approximately how much?

Mr. Haas: The same objection.

The Witness: It varies.

Q. (By Mr. Keith): Varies between what figures?

Mr. Haas: The same objection.

Q. (By Mr. Keith): Would it be two or three or four cents?

Mr. Haas: Same objection. I object on the grounds it is leading.

The Witness: Zero to two.

Q. (By Mr. Keith): By "zero," you mean that the zero figure you mean would be the same price?

A. Yes.

Q. And the two cents would be two cents below the Union Oil Company figure? A. Uh-huh.

Q. Do you know whether or not the retail outlets generally charge a lower price than the Union Oil Company stations?

(Deposition of Fred Perry Olsen.)

Mr. Haas: Object, as calling for the conclusion of the witness, and without foundation.

The Witness: Generally lower.

Q. (By Mr. Keith): By approximately how much?

Mr. Haas: Same objection.

The Witness: Two cents. [31]

* * *

Q. (By Mr. Keith): When you answer a question, "I have knowledge and information that there was a discussion of retail price," I am merely asking, when you say "yes" to that question, what did you have in mind? That's all I'm asking: What did you have in mind when you said "yes," to that question?

Mr. Barnum: Mr. Keith, let me intervene for just a moment here. There is a valid objection that can be made, even in deposition for discovery purposes, as to relevancy of information. And when you ask a question that is so broad that neither the witness nor the attorney can pass upon the relevancy, there is no way of knowing what you are driving at, in other words.

Mr. Keith: It is obvious.

Mr. Barnum: You want to get it down to where this conversation took place, if any, and who had the conversation, and at what time, and what was the subject.

Mr. Keith: I would like to——

(Deposition of Fred Perry Olsen.)

Mr. Barnum: You go so completely broad he hasn't any way of knowing; neither have I.

Mr. Keith: All I'm trying to find out, what knowledge and information he has. And then I will proceed to set the time and place and persons present.

The Witness: I never made any notes. I can stop you there.

Q. (By Mr. Keith): I'm not talking about notes. When you answered "yes" to that question, what did you have in mind? What knowledge and information do you have with respect to discussions between your company and Union Oil Company as to retail prices? [34]

A. Talked to them to find out what was going—what the prices are in different areas.

Q. Did you talk to them personally?

A. I have talked to them.

Q. Approximately when did you say that those conversations occurred?

A. I never made any note, as I just told you. Periodically.

Q. Who did you talk to?

A. Usually local people.

Q. Do you have any specific recollection as to any conversation with respect to Fresno prices?

A. Yes.

Q. And approximately when would those have occurred?

A. Last—probably was '59 sometime. When I couldn't tell you.

(Deposition of Fred Perry Olsen.)

Q. Who would you have talked to?

A. The last person I remember, Mr. Christopher.

Q. Christopher of Union Oil Company?

A. Yes.

Q. Do you recall what was said in that conversation, Mr. Olsen?

A. Just asked him about retail, discussing retail price.

Q. What did he say about retail price?

A. This is a telephone conversation, and it was quite a few—at least a year ago, and I just discussed them. I can't——

Q. In substance, what is your best recollection as of now, as to what was said?

A. Certain people were doing certain things.

Q. Do you recall what certain people you were talking about, and what certain things you were talking about? I would take it [35] you were discussing a—what you might call a price war situation? A. Usually when people——

Q. There had been a reduction in the retail price of gasoline?

A. That's right. I asked him why, what his knowledge of it was.

Q. What did he say about it?

A. Most of the time he didn't know.

Q. Did you offer any—any other additional comment to the conversation? Or did you just say, "What do you know?" And he said, "Nothing." That was the end of the conversation? Or was there more to it?

(Deposition of Fred Perry Olsen.)

A. Discussed it, and what could be done to——

Q. Raise the price of gasoline?

Mr. Haas: I'm going to object, on the grounds you are leading the witness.

Q. (By Mr. Keith): All right. Did you discuss with him whether or not anything should be done to raise the price of gasoline in Fresno?

A. We discussed what was being done to raise the price of gasoline.

Q. What was the substance of that conversation? What was said and done?

A. Obvious. It finally came up.

Q. Pardon me? A. It finally came up.

Q. Did Union Oil Company raise the price?

A. Uh-huh.

Q. After this conversation?

A. Well, it was some time after; I don't [36] know.

Q. Do you recall whether or not you had similar conversations during period of '56 to '58?

A. Probably did.

Q. Probably did? A price break would occur, and then you would call up Mr. Christopher and discuss this price break?

Mr. Haas: Wait a minute. Just a minute. Object, on the grounds that you are leading the witness.

Q. (By Mr. Keith): Is that correct, Mr. Olsen?

A. If Chris was there then.

Q. Either Chris or whoever was working for Union Oil Company as the Fresno manager?

A. (Nods head in the affirmative.)

(Deposition of Fred Perry Olsen.)

Q. Would he ever call you up, or you always called him up?

A. I don't believe he ever called me.

Q. Did you ever discuss this case at all with anybody from Union Oil Company?

A. Never even knew about this.

Q. Did you know about any price war in Ventura Avenue, in Fresno, during the period '56 to '58?

A. Yep. Wasn't only Ventura Avenue.

Q. There were price wars out there?

A. Yes.

Q. You have a service station out there on Ventura Avenue, do you not? A. Uh-huh.

Q. Your records show that Dan Mencerelli at 1st and Ventura——

A. That isn't a service station. That is—I don't know what that is there for.

Q. Here's another one, Pete Beatrice? [37]

A. That isn't a service station; that should be stricken out. That is—we leased the land; not even a pump, no, nothing.

Q. You did—— A. A used car lot.

Q. You did have a service station on Ventura Avenue, didn't you?

Mr. Haas: Leading and suggestive.

Q. (By Mr. Keith): Did you have a service station on Ventura during the period '56 to '58 in Fresno? A. I believe we did.

Q. Do you know who operated that station?

A. I believe it was Slaten Brothers; I don't believe that is on there. This is a distributor of ours.

(Deposition of Fred Perry Olsen.)

Q. Could you add that on here, please?

A. Shall I cross these over? These are not service stations.

Q. If you believe they should be crossed off.

A. Absolutely.

Mr. Barnum: It is shown here October 1958.

The Witness: Oh, '56 we didn't have, in '56.

Q. (By Mr. Keith): Or whatever it would be?

A. There it is—pardon me. Still in '56, it was not a service station; never was.

Mr. Barnum: Ventura was renamed.

Q. (By Mr. Keith): Kings Canyon Road? I see. A. Was in '57, Jim.

Q. Tell me this: Do you recall ever discussing Union Oil Company service stations, the prices charged at a Union Oil service [38] station at 4010 Ventura Avenue, with any representative of the Union Oil Company? A. Yes.

Q. Who? When would that have been?

A. Probably in '58.

Q. And who did you have that conversation with? A. Probably Chris.

Q. Mr. Christopher of Union Oil Company?

A. Yes.

Q. What was said in that conversation? Was that over the telephone?

A. (Nods head in the affirmative.)

Q. What was said at that conversation?

A. What was going on out there?

Q. And in what sense?

A. Why was that area down?

(Deposition of Fred Perry Olsen.)

Q. Why was the service station at 4010——

A. No, that area.

Q. Why were the service stations in that area down? What did Mr. Christopher say?

A. As I remember, "private feuds."

Q. Between who?

A. I wouldn't want to be held to this, because I am not exact. But it seems a couple of majors, two or three majors along the area there.

Q. Which majors would that be?

A. I am just not sure of which ones, today.

Q. Some majors along the East Ventura strip?

A. Yes. [39]

Q. And was there any discussion as to who had caused the price break, which major?

A. To my knowledge, no.

Q. Was that the full substance of that conversation, Mr. Olsen? A. More or less.

Q. Is that all you can recall? You said "more or less." I would like to know the more or less?

A. Just like—well, that's the substance of the conversation.

Q. Well, I would like the full recollection of that conversation; I think it is important in this lawsuit, and I would like to have it as completely and fully as you possibly remember it. I am entitled to that information.

A. You have it. I mean, probably—the thing is, all I can remember is the basic facts, or the basic deals that were talked about. I can't remem-

(Deposition of Fred Perry Olsen.)

ber. I probably asked him to see it hit Life at some time.

Q. Did you discuss the price that was being charged by the Sunland station on Ventura?

A. I couldn't answer that. I——

Q. I assume that's why you called?

A. Chances are it was.

Q. Is that why you called him up, because of your interest in the Sunland station on Ventura?

A. Naturally.

Q. Were you concerned with the fact the Sunland station had to go at a very low price during this price war?

A. If you make that more specific I will give you a specific [40] answer.

Q. What were you concerned about when you called Mr. Christopher about this East Ventura situation?

Mr Haas: Your voice dropped.

Q. (By Mr. Keith): What were you concerned about when you called Mr. Christopher, about this East Ventura situation?

A. We didn't want to have to lower our price.

Q. Had you lowered your price before the conversation? A. No.

Q. Did you, after the conversation?

A. That is something I don't know. I don't think we did.

Q. Well, what did Mr. Christopher say?

A. I don't think we did.

(Deposition of Fred Perry Olsen.)

Q. What did Mr. Christopher say as to the Union Oil Company pricing policy at that time?

Mr. Haas: If anything.

Q. (By Mr. Keith): If anything?

A. He didn't discuss the policy.

Q. It ended up you wouldn't lower price, or would lower price? Any statement to that effect?

A. No definite statement from either person.

Q. I take it from your answer you were trying to find out the cause of the price war and Mr. Christopher indicated there was some rivalry, that somebody lowered their price; that was about the situation?

A. That is from what my recollection is. [41]

Q. Did he say that he would attempt to keep the prices up?

A. Keep them up? They were already down.

Q. Did he say they would try and bring them up, then? A. They were all working on it.

Q. All companies were working on it?

A. Yes.

Mr. Haas: I move to strike the answer as being nonresponsive.

Q. (By Mr. Keith): Did Mr. Christopher say he would contact other companies?

A. No; he did not.

Q. What did he mean by this: "They were all working on it"?

Mr. Haas: Just a minute, please. I am going to object to that question on the grounds that the wit-

(Deposition of Fred Perry Olsen.)

ness has given so such testimony. It is leading and suggestive.

Mr. Keith: The witness testified that Mr. Christopher said they were all working on it.

Mr. Haas: That's not the witness' testimony. I object to that statement, on the grounds it is leading and suggestive, and attempting to mislead the witness.

Mr. Barnum: He stated that, as a fact, outside the conversation.

The Witness: As an assumption.

Mr. Barnum: A conclusion, or an opinion.

Q. (By Mr. Keith): Mr. Christopher had said that?

A. No. Christopher did not say that in any way, shape or form.

Q. Were the prices brought back up after this conversation? [42]

A. What period of time do you mean?

Q. Shortly after the conversation?

Mr. Haas: I'm going to object to that question as calling for the conclusion of the witness.

The Witness: I don't know.

Q. (By Mr. Keith): Could you name at least one or two of the majors that you were talking about? You said "all"?

A. Right along there, a Tidewater, Standard, Union—naturally. You lived out there, Jim; I can't remember now which. Probably the whole mess of them. All the majors are along there. I just recall three right there in that immediate area.

(Deposition of Fred Perry Olsen.)

Q. Let me ask you one more question on the subject matter: Do you recall any other conversation about the pricing of gasoline at the East Ventura Avenue, other than the one we have just gone into? Was this just one conversation, or were there others that you now recall?

A. To my knowledge it was the—probably the only one. I just couldn't answer that truthfully.

Q. Have you ever had any representative of the Union Oil Company call you up personally and discuss your—the Sunland service station pricing policy? A. No. [43]

* * *

Examination

By Mr. Haas:

Q. As I understand your testimony, Mr. Olsen, any gasoline which was acquired by Sunland from Union during the period '57—1957, 1958—went into the service stations located either in the Los Angeles basin, or Northern California?

A. That is correct.

Q. In the year 1956 Sunland acquired no gasoline from the Union Oil Company?

A. (Nods head in the affirmative.) According to our records.

Q. Is that correct?

A. According to our records. [47]

Q. And I believe you testified that the most southerly station in which any Union gasoline was

(Deposition of Fred Perry Olsen.)

sold through a Sunland station during this period, '57 and '58, was in Modesto, California?

A. It wasn't Union gasoline; it was Sunland gasoline.

Q. I understand that. But it was gasoline which Sunland had gotten from Union; is that correct?

A. Yes—what did you say, Modesto?

Q. Yes; that's what I understood your testimony to be.

A. Modesto. The Modesto service plant.

Mr. Haas: I have no further questions.

Further Examination

By Mr. Keith:

Q. Mr. Olsen, do you sell Sunland Refining Company gasoline to any other retail outlets besides the Sunland service stations? A. Yes.

Q. What other retail outlets do you sell to?

A. No—pardon me. That is, I am wrong.

Q. All of your gasoline goes to Sunland service stations?

A. We do not sell to any retail outlets, to my knowledge.

Mr. Haas: You mean other than the Sunland brand, the retail outlets that are marked Sunland?

The Witness: That isn't what he asked.

Mr. Keith: I thought that's what I asked. I will state it to you again:

Q. Do you sell your gasoline to any other retail outlets other than Sunland service station outlets? [48] A. No.

(Deposition of Fred Perry Olsen.)

Q. Do you sell your gasoline to any wholesaler or jobbers for distribution to other outlets?

A. Yes.

Q. Which ones are those?

A. Oh, God! Red Triangle—talking presently?

Q. Well, present; if there is any deviation, the period '56, '58?

A. I can't remember '56—'58 on that. Probably Red Triangle, also. I just can't remember.

Q. Red Triangle would be a wholesaler?

A. Yes.

Q. Where would that gasoline go to?

A. Here in this area.

Q. And what brand would it be sold as?

A. The rebranded letter is under Consumers.

Q. Consumers?

A. Consumers. Also under Sunland.

Q. Any other wholesaler or jobber?

A. Dave Smith is a jobber; he sells under Sunland brand.

Q. Well, when you make these other sales would they include Union Oil Company gasoline; when you say you sell to Red Triangle would Union Oil Company gasoline be involved in that transaction?

Q. How about in Northern California?

A. We don't.

Q. Any wholesalers or jobbers in Northern California? A. No.

Q. How about Southern California?

A. Yes.

Q. What would that be? [49]

(Deposition of Fred Perry Olsen.)

A. You're talking about '56 to '58?

Q. No, as of the present?

A. R & M Petroleum.

Q. R & N? A. M.

Q. Where would they be?

A. They are in L. A., someplace.

Q. Do you know how they brand their gasoline?

A. No; it goes all over.

Q. All over, under various names?

A. Uh-huh; I imagine so. I don't know.

Q. Who else would that be besides R & M?

A. Oh, MacVey; that is the only two I can remember.

Q. When you sell to them, would you supply them with Union Oil Company gasoline that you acquired through these Union Oil Company transactions?

A. No—wait a minute; what are you talking about?

Q. I'm talking about as of now, you say.

A. We aren't buying any Southern California gasoline from Union.

Q. As of now? A. Not to my knowledge.

Q. How about during this period '56 to '58? You say R & M?

A. R & M? I don't believe so. I might be—I don't know. MacVey, I would say yes.

Q. MacVey you would say yes?

A. I would say yes; I'm not positive.

Q. Yes; you mean you would supply them with Union Oil Company gasoline? [50]

(Deposition of Fred Perry Olsen.)

A. Chances are we did. Whether we did or not, I don't know.

Mr. Keith: Okay. No further questions. [51]

PLAINTIFF'S EXHIBIT No. 1

Sunland Refining Corporation
Petroleum Products
Head Office—East and California Avenues
Fresno, California

Gasoline Purchased From Union Oil Company
Los Angeles and Richmond

Date	Ethyl Gasoline	Regular Gasoline	Total
1956	-0-	-0-	-0-
1957			
October	13,033	17,045	30,078
November	133,975	146,324	280,299
December	85,469	84,207	169,676
1958			
January	-0-	-0-	-0-
February	64,403	56,766	121,169
March	81,437	124,926	206,363
April	-0-	-0-	-0-
May	-0-	-0-	-0-
June	-0-	-0-	-0-
July	-0-	-0-	-0-
August	-0-	-0-	-0-
September	89,912	144,059	233,971
October	103,174	130,660	233,834
November	99,552	123,496	223,048
December	99,126	139,775	238,901
Total	770,081	967,258	1,737,339

PLAINTIFF'S EXHIBIT No. 4

Sunland Refining Corporation
Petroleum Products
Head Office—East and California Avenues
Fresno, California

Prices Paid Union Oil Company for Gasoline
(Ex Federal and State Taxes)
1956 - 1958

Richmond:

Date	Ethyl	Regular
1956	-0-	-0-
1957		
October	$.146	$.124
November	.146	.124
December	.146	.124
1958		
February	.146	.124
March	.146	.124
Price on Exchange:		
September	.142	.12
October	.142	.12
November	.142	.12
December	.142	.12

PLAINTIFF'S EXHIBIT No. 5

Sunland Refining Corporation
Petroleum Products
Head Office—East and California Avenues
Fresno, California

Prices Paid Union Oil Company for Gasoline
(Ex Federal and State Taxes)
1956 - 1958

Los Angeles:

	Ethyl	Regular
1956	-0-	-0-
1957		
November	$.143	$.121
December	.143	.121
1958		
February	.141	.117
March	.141	.117

[Title of District Court and Cause.]

DEPOSITION OF W. L. MARCONI

Be It Remembered, that pursuant to notice of taking deposition, affidavit and subpoena, and on Friday, May 13th, 1960, commencing at the hour of 10:00 o'clock a.m. of the said day, at the law offices of Rosson & Pearson, 217 West Seventh Street, Hanford, California, before me, George H. Wheeler, a Notary Public in and for the County of Kings, State of California, personally appeared W. L. Marconi, a witness in the above-entitled Court and cause, produced as a witness on behalf of the plain-

tiff therein, under and pursuant to the provisions of the Federal Rules of Civil Procedure, who, being by me first duly sworn, was then and there examined and interrogated by Attorney Maxwell Keith, 111 Sutter Street, San Francisco 4, California, Counsel for the plaintiff;

And there also being present Attorney Richard Haas, representing the law firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, Counsel for the defendant Union Oil Company of California;

And there also being present Attorney A. Hugo Pearson, representing the law firm of Rosson & Pearson, 217 West Seventh Street, Hanford, California, Counsel for the witness W. L. Marconi;

And the following proceedings were thereupon had, and the following testimony was thereupon given, to wit: [2*]

W. L. MARCONI

a witness, called on behalf of the plaintiff, under the Federal Rules of Civil Procedure, being first duly sworn, testified as follows:

Examination

By Mr. Keith:

As far as I'm concerned this deposition may be signed in the presence of any Notary.

Mr. Haas: So stipulated.

Q. (By Mr. Keith): Will you state your name, please? A. W. L. Marconi.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of W. L. Marconi.)

Q. And your address?

A. 525 West Third Street; that's the business address.

Q. And that's Caminol Oil Company?

A. Caminol Oil Company.

Q. Caminol, (spelling) C-a-m-i-n-o-l?

A. Right.

Q. Company? A. Right.

Q. And what general business is Caminol Company in, Mr. Marconi?

A. Marketing, refining and marketing of petroleum products.

Q. That would be gasoline and oil?

A. Gasoline and diesel fuel and so forth. [3]

* * *

Q. Now, looking at the first page, Mr. Marconi, posted pump prices Caminol Oil Stations, Fresno, for the period '56 to '58.

Now, these are your posted pump prices which include Federal and State tax, I assume?

A. Right.

Q. You have various numbers on the sheet, 279, 358, 359. What do those represent?

A. That is the way we designate the location of the stations. [5]

Q. These are the particular numbered stations?

A. The stations at—let's take a look. 279, California and C Street. Rather than have the bookkeeping department each time have to write "Cali-

(Deposition of W. L. Marconi.)

fornia and C Street," we designate as Station Number 279.

Q. These are locally-owned stations of Caminol?

A. We own some; we lease some. We operate them all with salaried personnel.

Q. I see. I believe they are called Beacon Stations, are they not, (spelling) B-e-a-c-o-n?

A. That is the station—those are the stations that have the numbers.

Q. Now, then, on page three, subdivision B here, you refer to the Fresno area sales under the color and insignia through distributor or retail outlet.

Other than company-owned stations, you have Seibert, (spelling) S-e-i-b-e-r-t—these are—are these called Seibert Stations?

A. Well, they are stations that he sells—some stations are under control by Seibert; some are not.

Q. What would the trade name be?

A. Beacon Gasoline.

Q. All your—as Seibert, all your stations marked under Seibert are called Beacon?

A. No, they are not. The individual operator sometimes uses his own name for the service station. Seibert doesn't own all of [6] these stations, if that's what you are alluding to.

Q. Let's take an example. Let's take the station at Ventura and Hazelwood, (spelling) H-a-z-e-l-w-o-o-d?

A. I happen to know that he owns that one.

Q. He calls his gasoline Seibert?

(Deposition of W. L. Marconi.)

A. Just—no. Known as Beacon Station; sold as Beacon gasoline.

Q. Looking at this list, are there any stations there that would sell under a different name than Beacon?

A. That I couldn't tell you at the moment. Probably he may have had some that had rebrands, but I couldn't determine that.

Q. Anyway, you sell him Caminol gasoline, which he in turn distributes to these various stations he either owns or leases or has some kind of contractural relationship with?

A. With the operator.

Q. With the operator. You would say this, generally: They are Beacon Stations? A. Yes.

Q. Now, then, looking at the last sheet, Mr. Marconi, recap of gasoline purchases from the Union Oil Company for the period January, '56 to December, '58, this sheet purports to set forth the gallons and the cost of gasoline acquired by Caminol from Union Oil Company; is that correct?

A. That's correct.

Q. And the sheet is broken up into two categories: Ethyl and Security. Does Ethyl designate the purchase of ethyl gasoline from Union Oil Company? A. That's right. [7]

* * *

Q. How do you arrange for the purchase of this gasoline?

A. We do that—why, you notice there is very

(Deposition of W. L. Marconi.)

little correspondence in the file. These arrangements are made on a month-to-month basis.

Q. Who handles that?

A. Our sales manager handles it.

Q. Have you ever handled such a——

A. Not in the last ten or twelve years. [8]

* * *

Q. Now, where do you acquire the Union Oil Company gasoline, Mr. Marconi?

A. This came out of Oleum.

Q. This—you are referring to this last page here? A. That's right.

Q. And where is that gasoline distributed by your company? A. In the Bay Area.

Q. And what cities and towns do you——

A. Oh. [9]

Q. ——distribute the Oleum gasoline?

A. Probably anywhere from Ukiah on the north, to Salinas on the south.

Q. I wonder if I could ask you to give us your best recollection, as best you can, of the cities that Caminol has service stations in Northern California, where this product might go?

A. It might go in Ukiah, might go in—wait a minute, I am trying to work down the State—Cloverdale. Might go in—do you have a map that shows the cities?—Richmond, Concord, Santa Rosa, Oakland, Berkeley, and San Jose, Watsonville, Salinas, Gilroy. That would cover most of them.

Q. Do you have personal knowledge, Mr. Mar-

(Deposition of W. L. Marconi.)

coni, that Union Oil Company has gasoline service stations in these cities?

A. I believe they do; I don't know that they have stations in all of those cities.

Q. Mr. Marconi, I think I omitted something. I wonder if I could get a little brief description of your position in Caminol?

A. I am the executive vice president.

Q. And what would your duties be?

A. Well, to manage the company generally.

Q. How long have you been the executive vice president?

A. Oh, the last ten or twelve years. Ten years.

Q. How long have you been in the petroleum business? A. About thirty years.

Q. And how long have you been with Caminol?

A. Twenty-five years. [10]

Q. Going back to the Union Oil situation, have you ever arranged for—that is, your company, ever arranged for picking up Union Oil Company gasoline in the Los Angeles basin?

A. No, not to my knowledge.

Q. Always out of the Oleum station?

A. Yes.

Q. Refinery? Now, would it be possible that any of this Oleum pickup comes down into Fresno for distribution in Fresno? A. No.

Q. It is always in Northern California?

A. Yes.

Q. In these various towns that you have mentioned? A. Yes.

(Deposition of W. L. Marconi.)

Q. In these towns that you have mentioned do you distribute there under the—in the retail field, under the name of Beacon? A. That's right.

Q. Now, what is the policy of Caminol with respect to the retail pricing of gasoline? Are you higher or lower than the major companies, Mr. Marconi? A. We are lower.

Q. Do you have any general policy in that respect?

A. Well, that fluctuates. It depends on the attitude of the competition. There is a general rule when prices are what we consider a normal level, we are normally two cents below.

Q. Would it ever come to a time when you would be lower by more than that? A. No.

Q. Well, if Union Oil Company, as an example, should lower the price to 34 cents, to 32 cents ethyl, would you lower your price [11] from—assuming 32 to 30 cents?

A. In that category, we possibly would.

Q. You attempt to stay two cents below?

A. Down to a certain point.

Q. What would that point be?

A. Well, it would depend on circumstances. There isn't really any set rule which governs that.

Q. Do you recall ever having personally been involved in any price disturbance on Ventura Avenue in Fresno, California?

A. We have had price disturbances in the Fresno area, from time to time, for the past eighteen months.

Q. This would be the past eighteen months?

(Deposition of W. L. Marconi.)

A. Yes.

Q. Do you have any personal recollection of participating in any of those price disturbances?

A. I am sure we have been involved. We couldn't be a part of the industry without being involved.

Q. And you say "involved." What do you mean by that?

A. I mean in the general marketing area.

Q. You say "involved." What do you mean by that? Lower your price?

A. If competition lowers their price; I am not necessarily meaning major companies. If independents would lower their prices we would have to meet it, in order to protect our volume. [12]

* * *

Q. Does Union ever discuss retail prices with you? A. No.

Q. Any representative or agent of Union Oil Company? A. No.

Q. Where is your refinery located, Mr. Marconi?

A. Here in Hanford.

Q. Do you have—you had a lease at the Caminol Oil refinery at Santa Fe Springs at one time, did you not? A. We owned it.

Q. Have you continued to own that?

A. We sold that twelve years ago.

Q. Was that sold to a major company?

A. No, that was sold to the Belgian government.

(Deposition of W. L. Marconi.)

Q. If I take your statement of the Fresno stations, and add to it your Northern California areas, do I have a pretty fair statement of the areas where you have service station outlets?

A. Roughly, Mr. Keith, we market from Delano on the south, we are now in Bakersfield, just had a new distributor there. Our marketing area covers the San Joaquin Valley from Bakersfield on the south, to Ukiah on the north and over on the coast it would be from—not Ukiah, it's not on the coast, is it? It is inland.

On the coast it would go from about Cloverdale on the north to Salinas on the south, excluding San Francisco.

Q. Would it be fair to say that in most if not all of the [13] cities that you have service stations, that Union Oil Company has service stations?

A. I would think so.

Q. And you are—the general policy of being two cents below the majors would apply in all of these cities where you have service stations?

A. That's right.

Q. And I take it then you don't retail in the Los Angeles basin area? A. No, we do not. [14]

* * *

Q. To whom do you distribute your refined gasoline, Mr. Marconi?

Mr. Haas: By "you," you mean the gasoline that Caminol refines; is that the question?

(Deposition of W. L. Marconi.)

Mr. Keith: Just trying to find out any other than what we have set down here. We can get at it this way.

The Witness: We have other distributors and other dealers in other areas, as we pointed out a minute ago. We market throughout Northern California.

Q. (By Mr. Keith): Who would some of those distributors be?

A. We have Modesto Petroleum Company, Modesto. Petroleum Products Company in Stockton. The Inland Oil Company in Sacramento. The Valley Oil Company in Salinas. Mathson (spelling) M-a-t-h-s-o-n Petroleum Company in Watsonville.

Q. What are some of the trade names?

A. They sell principally under the Beacon brand.

Q. Is there any other retail outlet that sells other than Beacon, under the Beacon name, that might acquire Caminol refined gasoline?

A. That's right. [20]

* * *

Recap of Gasoline Purchases From Union Oil Company for the Period January, 1956—December, 1958

	Ethyl			Security		
	Gallons	Cost	Cost Per Gallon	Gallons	Cost	Cost Per Gallon
1956						
January	102,787	$ 14,801.33	.144	165,093	$ 20,141.34	.122
February	25,200	3,628.80	.144	70,267	8,572.58	.122
March	48,420	6,875.64	.142	174,132	21,244.11	.122
April	115,132	16,579.00	.144	321,713	39,892.43	.124
May	210,806	30,356.05	.144	401,544	49,791.45	.124
June	125,114	18,016.41	.144	388,448	48,167.56	.124
July	69,079	9,947.37	.144	220,995	27,403.38	.124
August	155,606	22,407.26	.144	359,995	44,639.37	.124
September	240,690	34,659.37	.144	360,042	44,645.22	.124
October	135,493	19,510.99	.144	269,917	33,469.72	.124
November	—	—	—	3,484	449.44	.129
December	—	—	—	—	—	—
1956 Sub-total	1,228,327	$176,782.22	.14392	2,735,630	$338,416.60	.12371
1957						
January	3,018	$ 449.68	.149	5,334	$ 688.09	.129
February	—	—	—	—	—	—
March	—	—	—	—	—	—
April	—	—	—	—	—	—
May	—	—	—	—	—	—
June	—	—	—	10,407	1,363.32	.131
July	214,855	32,442.98	.151	437,260	57,281.06	.131
August	214,641	32,410.63	.151	358,725	46,992.70	.131
September	314,140	47,193.73	.1502	545,486	71,076.75	.1303
October	207,704	30,324.91	.146	364,973	45,986.59	.126
November	135,304	19,754.38	.146	349,592	44,048.58	.126
December	191,706	27,989.08	.146	318,514	39,495.71	.124
1957 Sub-total	1,281,368	$190,565.39	.14872	2,390,291	$306,932.80	.12841

1958						
January	201,626	$ 29,437.40	.146	415.194	51,484.93	.124
February	167,995	24,527.12	.146	305,094	37,831.66	.124
March	97,929	14,297.62	.146	211,837	26,267.79	.124
April	56,516	8,251.20	.146	151,445	18,779.18	.124
May	108,826	15,888.60	.146	326,946	40,541.33	.124
June	117,363	17,134.99	.146	249,884	30,985.61	.124
July	127,697	18,636.73	.146	231,918	28,757.81	.124
August	96,780	14,129.87	.146	226,424	28,076.60	.124
September	178,137	25,431.53	.1427	296,749	35,840.78	.1208
October	138,373	19,648.95	.142	322,524	38,702.88	.12
November	71,993	10,223.00	.142	246,000	29,520.00	.12
December	69,181	9,823.69	.142	184,787	22,174.44	.12
1958 Sub-total	1,432,416	$207,430.70	.14481	3,168,802	$388,963.01	.12275
Grand Total	3,942,111	$574,778.31	.14580	8,294,723	$1,034,312.41	.12470

Information Source:

Caminol Company Monthly Voucher Records.

PLAINTIFF'S EXHIBIT No. 4-A

Caminol Company

Intra-Company Memorandum

To V. L. Anderson.

Copies to W. L. Marconi, Accounting Dept.

Date September 30, 1957.

Effective with the opening of business Friday, September 27th, prices on gasoline from Union out of Richmond have been reduced to $.126 for regular and $.146 for ethyl.

Yours very truly,

/s/ R. C. INGRAM.

RCI:bb

PLAINTIFF'S EXHIBIT No. 4-B

Caminol Company

Intra-Company Memorandum

To V. L. Anderson.
Copies to W. L. Marconi, Accounting Dept.
Date September 25, 1957.

Effective with the opening of business Monday, September 23, 1957, Union has reduced the price of our gasoline out of Richmond to 12.9c and 14.9c. I will fill in the details personally Monday morning.

Yours very truly,

/s/ R. C. INGRAM.

RCI:bb

PLAINTIFF'S EXHIBIT No. 5

Caminol Company

Intra-Company Memorandum

To V. L. Anderson.
Copies to W. L. Marconi, Accounting Dept.
Date Dec. 6, 1957.

Effective December 1st our price on Regular Gasoline out of Union will be $.124, Ethyl remains the same at $.146. However, henceforth, we are to get 98 Octane at the $.146 price of Ethyl.

Yours very truly,

/s/ R. C. INGRAM.

RCI:bb

[Title of District Court and Cause.]

DEPOSITION OF EARL W. ALLEN

produced as a witness on behalf of plaintiff, at 2:00 p.m., June 21, 1960, at 727 West Seventh Street, Los Angeles, California, before Harry L. Tryer, a Notary Public of Los Angeles County, California, pursuant to subpoena.

Appearances:

MAXWELL KEITH, ESQ.,
For Plaintiff;

BROBECK, PHLEGER & HARRISON, by RICHARD HAAS, ESQ.,
For Defendant Union Oil Company of California;

THOMAS M. VAIL, ESQ.,
For the Witness.

EARL W. ALLEN

produced as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keith:

Q. State your name for the record, please.
A. Yes. E. W. Allen.
Q. That is Earl W. Allen?
A. Earl W. Allen.
Q. What position do you hold, Mr. Allen?
A. Executive Vice-president.

(Deposition of Earl W. Allen.)

Q. That is The Wilshire Oil Company?

A. Wilshire Oil Company of California.

* * *

Q. Does the Wilshire Oil Company refine oil, crude oil, into gasoline? A. Yes. [2*]

* * *

Q. Does any major oil company have any interest in Malco? A. No.

Q. You say around November, '55, Malco did acquire this refinery of Wilshire Oil?

A. Yes.

Q. Did the Wilshire Oil Company also have retail outlets in California?

A. Prior to the acquisition by Malco?

Q. Right. Or was it strictly a refinery you acquired?

A. Strictly a refinery. There were a few miscellaneous outlets, numbering maybe a half a dozen, very insignificant. It was a carry-over from the old properties, I think.

Q. Essentially a refinery——

A. Right. A refinery——

Q. ——operation?

A. Yes—essentially.

Q. Now, I believe that a large share of Wilshire Oil Company of California is owned by Pontiac Western Corporation; is that correct?

(Witness looks at his counsel.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Earl W. Allen.)

Mr. Vail: I don't know, Earl.

A. Well, it was (to Mr. Vail)—should I answer that?

Mr. Vail: Yes, if you know, answer it. [5]

Q. (By Mr. Keith): Yes. If you can tell us.

A. No. It has been up until a short time ago. At this date Wilshire is wholly owned by Gulf Oil.

Q. Wholly owned by Gulf Oil?

A. Wholly owned.

Q. Has Gulf Oil had an interest in Wilshire Oil of California from the period of November, 1955, to the present time, some interest?

A. No, no, none.

Q. Wasn't Pontiac Western a subsidiary of Gulf Oil? A. No.

Q. It was not? A. It was not.

Q. Wasn't there a period of time where Gulf owned fifty per cent of Wilshire Oil?

A. No period of time—no, not to my knowledge.

Q. When would you place the first date that Gulf Oil, directly or indirectly, through a subsidiary, acquired any interest in Wilshire Oil?

A. Gulf acquired Wilshire Oil in—this is close—February, '58—and it is a matter of record, shows on their financial statement, February of '58—to March, April, May—let's say three and a half months, say May, '58. They owned it, according to their financial statement, during that period.

Q. Gulf owned Wilshire, February, '57, to May, '57? [6] A. Yes. Something like that.

(Deposition of Earl W. Allen.)

Q. Now, you say, it is a 100 per cent company of Gulf?

A. Right. They turned around and sold it, see, in May, to Pontiac Western.

Q. And Pontiac Western is a subsidiary of Gulf? A. No. It was——

Q. I am not following this. I understood your testimony to be that as of now Wilshire is 100 per cent owned by Gulf Oil.

A. That is correct.

Mr. Vail: As of today.

A. (Continuing): That's right. The last couple of weeks—or approximately two or three weeks ago they purchased the stock from Pontiac Western of Wilshire Oil. They sold it and then repurchased at a later date, what it amounts to.

Q. (By Mr. Keith): In other words, they were in and out, they were in in '57, then out and back in again? A. Out and back in again.

Q. What knowledge and information do you have as to the ownership of Pontiac Western? Do you know who has any substantial shares in that company?

A. That company is dissolved now, no longer exists.

Q. Do you have any knowledge or information as to who owned any substantial shares—— [7]

A. I do.

Q. ——in '57?

A. Yes; I do. Pontiac Refining Company owned

(Deposition of Earl W. Allen.)

80 per cent and E. G. Coopman owned 20 per cent of the stock of Pontiac Western.

Q. Who owned Pontiac Refining Company?

A. Oh, I think—I am not acquainted with that—owned by various stockholders. Know some of them.

Q. Didn't Gulf have some interest in Pontiac?

A. No, no—or not to my knowledge.

Q. During the period November, '55, to February of '57, who controlled the Wilshire Oil Company?

Mr. Haas: By that do you mean who owned the stock?

Mr. Keith: Yes.

The Witness: Repeat that, please.

Q. During this period of November, '55, to February of '57, who controlled the Wilshire Oil Company? A. Malco.

Mr. Vail: Who owned the stock?

A. Malco.

Q. (By Mr. Keith): Did we establish who controlled or who had any substantial interest in Malco? Did any major oil company have any substantial interest?

A. Not—to my knowledge, none of them did. [8]

* * *

Q. Does Union Oil ask you what you are going to do with the gasoline? A. No.

Q. Just sell it to you?

A. Sell it to us.

(Deposition of Earl W. Allen.)

Q. Have they ever refused an order?

A. No.

Q. Going back to the subpoena again, No. 1, Mr. Allen, 1b asks for "the total amount of such regular and ethyl gasoline as was delivered to Fresno in such period." Does Union Oil Company deliver gasoline to Wilshire in Fresno? Or has Union Oil Company delivered gasoline to Wilshire in Fresno?

The Witness: The documentary information might help me on that.

(Documents handed to the witness by Mr. Vail.) [17]

A. Our records indicate none went to Fresno that we purchased from Union Oil.

Q. You do have gasoline stations in Fresno, do you not? A. Yes. [18]

* * *

Mr. Vail: May be photo copies. Is that all right with you?

Mr. Keith: That's fine. I think Mr. Haas would want a copy, too.

Mr. Haas: Whatever is going to be attached physically to the deposition, I want a copy of.

Mr. Keith: That is my understanding.

Mr. Vail: You are getting a copy of the deposition, then?

Mr. Haas: Oh, yes.

Mr. Vail: Then we will furnish you with copies.

Mr. Keith: You are going to make photostats of Exhibit 4, I believe?

(Deposition of Earl W. Allen.)

Mr. Vail: Got to get those two letters, then we will get the posted price lists.

Mr. Keith: Make copies of everything so far.

Mr. Vail: These things here (indicating)?

Mr. Keith: Yes.

Mr. Vail: Not going to fool around with [24] those.

* * *

Q. It is fair to state, is it not, Mr. Allen, that Wilshire generally charges a price lower than that charged by the major oil companies?

Mr. Haas: Well, I am going to object to the form of the question as calling for a series of conclusions of the witness.

Mr. Keith: Could you answer the question, Mr. Allen?

A. Wilshire's policy is to market 2 cents under the major oil companies at the retail level.

Q. Now, I believe the record shows that you own approximately—own or lease or control—300 service stations in California; is that correct?

A. I would say that is approximately right.

Q. Now, as of 1955 you did not own any service stations in the State of California?

A. I would say the company owned half a dozen.

Q. So that between '55 and the present time you have acquired approximately 300 retail outlets?

A. That is correct. [34]

* * *

June 23, 1960.

Maxwell Keith, Esq.,
111 Sutter Street,
San Francisco 4, California.

Dear Mr. Keith:

Re: Simpson vs. Union Oil Company of California

In accordance with our conversation, the delivery invoices were totalled in order to show the quantity of gasoline delivered by Union to Wilshire Oil Company for the calendar years 1957-1958 and the totals are as follows:

1957—

Regular gasoline	467,353 gallons
Premium gasoline	915,419 gallons
Total	1,382,772 gallons

1958—

Premium gasoline	4,212,642 gallons
Regular gasoline	2,446,157 gallons
Total	6,658,799 gallons

Very truly yours,

WILSHIRE OIL COMPANY
OF CALIFORNIA,

/s/ THOMAS M. VAIL.

TMV:vb

[Endorsed]: Filed August 31, 1960.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1958

May 21—Filed complaint and issued summons.

* * *

May 21—Filed affidavit of Richard S. Simpson in support of application for temporary restraining order.

May 21—Filed undertaking of plaintiff in sum $100.00 for temporary injunction.

May 21—Filed order to show cause & temporary restraining order, returnable May 26, 1958.

* * *

May 26—Filed affidavit of W. S. Christopher.

May 26—Filed affidavit of J. E. Campbell.

May 26—Filed affidavit of R. R. Pinochi.

May 26—Filed affidavit of R. H. Rath.

* * *

May 26—Ordered after hearing, motion on order to show cause and temporary restraining order, submitted. (Harris.)

June 3—Filed memorandum opinion & order of Court. (Motion for prelim. injunction denied and temporary restraining order terminated.) (Harris.)

1958

June 11—Filed notice & motion for deft. for summary judgment or to dismiss, June 23, 1958, with supporting memo.

June 11—Filed affidavit of W. S. Christopher in support of motion for summary judgment, etc.

June 19—Filed notice & motion by plaintiff to file amended complaint, June 23, 1958.

June 23—Ordered, motions to dismiss, for summary judgment and to file amended complaint, each continued to June 30, 1958. (Harris.)

June 30—Ordered after hearing, motions to dismiss and for summary judgment granted with plaintiff leave to file amended complaint. (Harris.)

June 30—Filed first interrogatories by plaintiff to defendant.

July 1—Filed stipulation & order granting motion of defendant to dismiss and plaintiff leave to file amended complaint. Motion for summary judgment ordered off calendar. (Harris.)

July 3—Filed amended complaint with demand for jury trial.

July 9—Filed stipulation & order extending time for defendant to plead to amended complaint to Aug. 11, 1958, and to plead to interrogs. to Sept. 10, 1958. (Harris.)

July 18—Filed notice & motion by Union Oil to dismiss and for summary judgment, July 28, 1958.

1958

July 18—Filed affidavit of R. H. Rath in support of motion for summary judgment.

* * *

July 21—Ordered after ex-parte hearing, motions to dismiss and for summary judgment continued to Oct. 20, 1958. (Harris.)

July 21—Filed order continuing motion to dismiss and for summary judgment to Oct. 20, 1958. (Harris.)

Aug. 6—Filed notice & motion by plaintiff to strike from motions for summary judgment, Aug. 11, 1958, with supporting memo.

Aug. 11—Ordered after hearing, motion of plaintiff to strike, denied. (Wollenberg.)

Aug. 21—Filed order exonerating bond of plaintiff. (Harris.)

Sept. 11—Filed stipulation & order of facts to be taken into consideration in ruling on various motions. (Wollenberg.)

* * *

Oct. 17—Filed request of plaintiff for admissions by defendant.

* * *

Oct. 20—Ordered after hearing, motion to dismiss and for summary judgment submitted. (Murphy.)

1958

Oct. 27—Filed stipulation that facts agreed at hearing of motion for summary judgment be deemed response of defendant to request for admissions, etc.

Oct. 30—Filed order denying motion for summary judgment, without prejudice to renewal at such time as more facts become the predicate upon which a decision on motion can be based. (Murphy.)

* * *

Nov. 24—Filed answer of defendant to amended complaint.

Nov. 28—Filed objections of defendant to interrogatories by plaintiff, with notice of hearing Dec. 8, 1958.

* * *

Dec. 22—Ordered after hearing, objections to interrogatories submitted. (Burke.)

1959

Jan. 7—Filed order, defendant's objections to 1st interrogatories sustained without prejudice. Any pretrial memo. shall include nature of evidence upon which defendant will rely and legal authorities in support of theory also to be included. (Burke.)

* * *

1959

Jan. 11—Filed stipulation re production and inspection and taking deposition of R. H. Rath.

Mar. 31—Filed 2nd request of plaintiff for admissions by defendant.

Mar. 31—Filed notice & motion by plaintiff for production and inspection, Apr. 6, 1959.

Mar. 31—Filed notice by plaintiff of motion for pretrial Apr. 6, 1959.

Apr. 6—Ordered after hearing, ruling on motion for production and inspection reserved. Pretrial assigned to Judge Burke, Apr. 24, 1959. (Harris.)

Apr. 9—Ordered pretrial continued to Apr. 20, 1959, at 2:00 p.m. (Burke.)

* * *

Apr. 9—Filed stipulation & order extending time for defendant to plead to 2nd request for admissions to Apr. 19, 1959. (Harris.)

Apr. 14—Filed response of defendant to 2nd request for admissions.

Apr. 24—Filed notice & motion by plaintiff for production and inspection, April 30, 1959, with supporting affidavit.

* * *

Apr. 28—Filed pretrial agenda by plaintiff.

Apr. 28—Filed pretrial statement of issues, by plaintiff.

1959

Apr. 28—Filed statement by plaintiff of nature of evidence re damages, and supporting memo.

* * *

Apr. 28—Filed statement by plaintiff of compliance with rule 16.

Apr. 29—Filed amended statement by plaintiff of compliance with rule 16.

Apr. 30—Pretrial. Further pretrial continued to May 7, 1959, at 2:00 p.m. (Burke.)

May 7—Ordered pretrial continued to May 21, 1959, at 2:00 p.m. (Burke.)

May 21—Further pretrial. Further conference continued to June 5, 1959. (Burke.)

May 22—Filed copy of tentative list of pretrial stipulations, by pltff.

June 5—Filed pretrial statement of plaintiff.

June 5—Filed affidavit of Maxwell Keith in support of pretrial stmt.

June 5—Filed deposition of Reese H. Taylor.

June 5—Further pretrial. Ordered pretrial statement filed. (Burke.)

* * *

July 14—Filed reporter's transcript on motion to dismiss and for summary judgment.

July 22—Filed reporter's transcript of pretrial conference, April 30, 1959.

July 24—Filed reporter's transcript of further pretrial May 31, 1959.

* * *

1960

Jan. 11—Filed motion of plaintiff for production and inspection Jan. 31, 1960, at 2:00 p.m. before Judge Burke.

Jan. 21—Hearing on motion for production and inspection. Arguments heard and counsel to prepare and present formal order. (Burke.)

Jan. 29—Filed motion of defendant for summary judgment Feb. 11, 1960.

Jan. 29—Filed affidavit of Richard Haas in support of motion for summary judgment.

Jan. 29—Filed affidavit of Moses Lasky in support of motion for summary judgment.

* * *

Feb. 11—Hearing on motion for summary judgment. Arguments heard and further hearing continued to March 10, 1960, at 2:00 p.m. (Burke.)

Feb. 12—Filed statement of defendant pursuant to proceedings of Jan. 20, 1960.

* * *

Mar. 10—Ordered, motion for summary judgment continued to Apr. 7, 1960, at 2:00 p.m. (Burke.)

Mar. 14—Filed notice by plaintiff of taking written interrogatories of Wilshire Oil Co.

Mar. 14—Filed interrogatories by plaintiff to Wilshire Oil Co.

Mar. 14—Filed notice by pltff. of taking written interrogs. of Caminol Oil Co.

1960

Mar. 14—Filed interrogatories by plaintiff to Caminol Oil Co.

Mar. 25—Filed deposition of Richard Simpson.

Apr. 4—Filed notice & motion by plaintiff to strike order for production & inspection, April 7, 1960, before Judge Burke.

Apr. 4—Filed notice & motion by plaintiff to compel answers to interrogs. Apr. 7, 1960, before Judge Burke.

Apr. 6—Ordered motion to compel answers and to strike, continued to Apr. 14, 1960, at 4:00 p.m. (Burke.)

Apr. 14—Hearing on motions to strike and to compel answers to interrogs. Motion to strike granted pursuant to stipulation and motion to compel ordered off calendar. Defendant to furnish plaintiff with that certain paint contract form used with nonlessee dealers. (Burke.)

Apr. 26—Filed reporter's transcript on motion re production of documents and interrogatories, Jan. 21, 1960.

* * *

June 28—Filed deposition of John E. Campbell.

July 20—Filed notice & motion by plaintiff of partial summary judgment on issues of violation of antitrust laws, July 29, 1960, before Judge Burke.

* * *

1960

July 25—Ordered motion for partial summary judgment on issue of violation of anti-trust laws, continued to Sept. 15, 1960, at 10:00 a.m. (Burke.)

July 26—Filed order continuing motion for partial summary judgment to Sept. 15, 1960, at 10:00 p.m. (Burke.)

• • •

July 31—Filed deposition of Earl W. Allen.

Sept. 16—Hearing on motion for partial summary judgment. Arguments heard, depositions of W. L. Marconi and Perry Olsen ordered filed as of May 13, and May 12, 1960, respectively. Memorandum of defendant ordered filed by Sept. 26, 1960, and case continued to September 26, 1960, for submission. (Burke.)

• • •

Sept. 26—Ordered case submitted on motion for summary judgment.

Sept. 28—Ordered submission of case vacated and defendant granted leave to file responsive answer to last memorandum of plaintiff. Case continued for submission to later date. (Burke.)

Sept. 29—Filed comments of defendant on reply by plaintiff to supplemental memo. on motion for summary judgment.

1960

Dec. 30—Filed memo. and order of Court. (Plaintiff has failed to establish basis for recovery in amount claimed or any amount; deft. summary judgment granted. Pltff's. reciprocal motion for partial summary judgment denied.) (Burke.)

* * *

1961

Jan. 10—Entered summary judgment—filed Jan. 9, 1961—for defendant for costs. (Burke.)

Jan. 10—Mailed notices.

Jan. 10—Filed objections by plaintiff to entry of judgment in summary judgment proceedings.

* * *

Jan. 19—Filed order staying execution of judgments pending appeal. (Burke.)

Jan. 31—Filed notice of appeal by plaintiff.

Jan. 31—Filed appeal bond in sum $250.00.

Feb. 1—Mailed notices.

Feb. 2—Filed designation by plaintiff of record on appeal.

Feb. 3—Filed designation by defendant of record on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, James P. Welsh, Clerk of the United States District Court for the Northern District of Cali-

fornia, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant and the appellee:

Excerpt from Docket Entries.

Complaint.

Undertaking for Temporary Injunction.

Affidavit of Richard S. Simpson in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Affidavit of W. S. Christopher.

Affidavit of J. E. Campbell.

Affidavit of R. R. Pinochi.

Affidavit of R. H. Rath.

Memorandum Opinion and Order of Court.

Motion to Dismiss and for Summary Judgment.

Affidavit of W. S. Christopher.

Notice of Motion by Plaintiff to File Amended Complaint.

First Interrogatories by Plaintiff to Defendant.

Order and Stipulation on Motion to Dismiss, etc.

Amended Complaint.

Motion of Defendant to Dismiss Amended Complaint and for Summary Judgment.

Affidavit of R. H. Rath in Support of Motion for Summary Jdgmt.

Motion of Plaintiff to Strike From Motion to Dismiss and for Summary Judgment.

Stipulation of Facts to Be Taken Into Consideration.

Affidavits of Richard S. Simpson attached to the Memo in Opposition to Dismiss, filed Oct. 15, 1958.

First Request of Plaintiff for Admissions by Defendant.

Stipulation that Certain Letters Be Deemed Response to First Request for Admissions.

Order Denying Motion for Summary Judgment Without Prejudice to Renewal.

Answer of Defendant to Amended Complaint.

Objections of Defendant to First Interrogatories by Plaintiff.

Order Sustaining Objections to Interrogatories Without Prejudice.

Stipulation re Proceedings.

Second Request by Plaintiff for Admissions.

Notice and Motion by Plaintiff to Set Pretrial Conference.

Response of Defendant to Second Request for Admissions.

Motion of Plaintiff for Production of Documents.

Statement of Defendant Under Rule 16.

Pretrial Statement of Plaintiff of Issues.

Pretrial Agenda by Plaintiff.

Statement by Plaintiff of Nature of Evidence re Damages and Supporting memo.

Statement of Plaintiff of Compliance with Rule 16.

Amendment of Plaintiff to Compliance with Rule 16.

Pretrial Statement for Ruling, by Plaintiff.

Affidavit of Maxwell Keith, filed June 5, 1959.

Motion of Plaintiff for Production of Documents

With Answers to Interrogatories and Trial Setting.

Motion of Defendant for Summary Judgment.

Affidavit of Richard Haas.

Affidavit of Moses Lasky.

Statement of Defendant Pursuant to Proceedings of January 20, 1960.

Written Interrogatories by Plaintiff to Earl Redmon.

Written Interrogatories by Plaintiff to W. L. Marconi.

Motion of Plaintiff to Strike Order for Production of Documents.

Motion of Plaintiff to Compel Answers to Interrogatories.

Motion of Plaintiff for Partial Summary Judgment on Issue of Violation of Antitrust Laws.

Memorandum and Order of Court Granting Motion of Defendant for Summary Judgment and Denying Motion of Plaintiff.

Judgment.

Objections of Plaintiff to Entry of Judgment in Summary Judgment Proceedings.

Order Staying Execution.

Notice of Appeal by Plaintiff.

Appeal Bond.

Designation of Record on Appeal by Appellant.

Designation of record on Appeal by Appellee.

Reporter's Transcript of Proceedings on Motion to Dismiss Amended Complaint and for Summary Judgment, Oct. 20, 1958.

Reporter's Transcript of Proceedings Pretrial Conference, April 30, 1959.

Reporter's Transcript of Proceedings Pretrial Conference, May 21, 1959.

Reporter's Transcript of Proceedings on Motion for Partial Summary Judgment, Sept. 16, 1960.

Deposition of Reese H. Taylor.

Deposition of Fred Perry Olsen.

Deposition of W. L. Marconi.

Deposition of John E. Campbell.

Deposition of Earl W. Allen.

Deposition of Richard Simpson.

I Further Certify the following items designated by Appellee are not included for the reason such items have not been filed of record in this office to this date:

Reporter's transcript of proceedings May 26, 1958, before Judge Harris.

Reporter's transcript of Proceedings June 5, 1959.

Reporter's Transcript of Proceedings Feb. 11, 1960.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, 1961.

[Seal] JAMES P. WELSH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: Filed No. 17308. United States Court of Appeals for the Ninth Circuit. Richard S. Simpson, Appellant, vs. Union Oil Company of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 10, 1961.

Docketed March 20, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17308

RICHARD S. SIMPSON,

Plaintiff-Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

To: The Honorable Chief Justice and Associate Justices of the United States Court of Appeals for the Ninth Circuit.

Appellant respectfully states that the following are the points upon which he intends to rely on appeal:

1. The trial court erred in entering summary judgment against the plaintiff.

/s/ MAXWELL KEITH,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 15, 1961.

[fol. 563]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Jertberg and Duniway, Circuit Judges, Carter, District Judge.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —January 12, 1962

This cause coming on regularly for hearing or submission, Mr. Maxwell Keith argued for the appellant and Mr. Moses Lasky, argued for the appellee and thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 564]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Jertberg and Duniway, Circuit Judges, Carter, District Judge.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—January 2, 1963

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[fol. 565]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,308

RICHARD S. SIMPSON, Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, Appellee.

Appeal from the United States District Court for the Northern District of California—Southern Division

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Before: Jertberg, and Duniway, Circuit Judges, and James M. Carter, District Judge.

OPINION—January 2, 1963

CARTER, James M., District Judge

This private antitrust case for damages was decided on motion for summary judgment in favor of appellee, Union Oil Company of California, hereinafter called Union, and against appellant, hereinafter called Simpson. Generally, it raises the issues of (1) interstate commerce; (2) violation of the antitrust laws and liability of Union, and (3) actionable damage suffered by the plaintiff.

We assume for the purpose of this decision, but expressly refrain from deciding, that there were triable issues of price fixing,[1] exclusive dealing,[2] the effect of the McGuire

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[1] See: *United States* v. *Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150.

[2] See Sec. 3, Clayton Act, 15 U.S.C. Sec. 14;
United States v. *Standard Oil Co.*, (D.C.So.Calif. 1948) 78 F. Supp. 850; affirmed *Standard Oil Co. of Calif.* v. *United States*, (1949) 337 U.S. 293;

(*footnote continued*)

[fol. 566] Act,[3] the effect of a prior consent decree of June 1959, whether the consignment program was a device or facade,[4] and inter-state commerce.[5] We refrain from deciding these questions as a matter of law or fact because it appears clearly on the record that Simpson suffered no actionable damage.

The Undisputed Facts

The following statement of facts which are apparently not in dispute, are taken largely from the statement of the case in the brief of Union.

Union is a producer, refiner and marketer of gasoline. It owns a long term lease on a parcel of land in Fresno, California, improved with a gasoline service station. On May 23, 1956, by written lease, Simpson subleased the station from Union for a term of one year, subject to termination by Simpson (but not by Union) on 30 days notice. In 1957 Union gave Simpson a new one year lease, ending by its

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United States v. *Richfield Oil Co.*, (D.C.So.Calif. 1951) 99 F. Supp. 280; affirmed per curiam, *Richfield Oil Co.* v. *United States*, (1952) 343 U.S. 922.

[3] 66 Stat. 632, 15 U.S. Code, Sec. 45(2), amendment of July 14, 1952 to Section 5(a) of the Federal Trade Commission Act.
See: *United States* v. *McKesson & Robbins, Inc.*, (1956) 351 U.S. 305, 310;
Business and Professions Code (Calif.) Sections 16,905, 17,040 and 17,045.

[4] See: *Appalachian Coals Inc.* v. *United States*, (1933) 288 U.S. 344, 360;
United States v. *Yellow Cab Co.*, (1947) 332 U.S. 218, 227;
Kiefer-Stewart Co. v. *Seagram & Sons Inc.*, (1951) 340 U.S. 211, 215;
Timken Roller Bearing Co. v. *United States*, (1951) 341 U.S. 593, 598;
United States v. *Masonite Corp.*, (1942) 316 U.S. 265, 278;
United States v. *Richfield Oil Corp.*, (D.C.So.Cal. 1951) 99 F. Supp. 280, 289;
United States v. *Standard Oil Co.*, (D.C.So.Calif. 1948) 78 F. Supp. 850, 859.

[5] The question of interstate commerce was merely touched on at pre-trial and was not passed upon by the trial court.

express provisions on May 22, 1958. Concurrently with the first lease, Simpson and Union executed a written Retail Dealer Consignment Agreement, terminable by either party at the end of any year and ceasing, under paragraph Eighth, upon any termination of Simpson's right to occupy the station.

In April 1958, Union notified Simpson that it was terminating the consignment agreement at the end of its year and would not offer him a further lease.

[fol. 567] May 21, 1958, the day before the end of his term, Simpson brought this action to enjoin Union from taking possession of its property and from leasing the station to anyone else. On June 3, 1958, the court denied the requested relief. The trial court filed an opinion, *Simpson* v. *Union Oil Company*, 162 F.Supp. 746, holding that both the lease and the consignment agreement had expired, and that the court could not compel the making of a new lease.

Union then sued Simpson in the state court in Fresno for unlawful detainer of the property and obtained judgment, adjudicating that at all times after May 22, 1958, Union was entitled to possession of the service station. Simpson thereupon surrendered possession.

Union moved to dismiss the federal action. The motion was granted, but leave was given Simpson to amend. An amended complaint was filed seeking damages in lieu of equitable relief. After certain pretrial proceedings, Union moved for summary judgment.

Thereafter Simpson himself moved for summary judgment on the issue of liability. Simpson's motion was denied, and Union's was granted. The trial judge filed a memorandum, reported in 1961 Trade Cases, Para. 69,936 p. 77,693.

Union's consignment method.

Prior to 1955, Union's merchandising method was by sale to retailers for resale by them. Union put its "consignment" program into effect in 1955, as a permanent measure. New dealers were taken on only as "consignees", and as rapidly as possible former dealers were converted to "con-

signees" or their leases not renewed. By the time Simpson sought to be a lessee, "consignment" was the only way in which Union would deal with new lessees.

Under this "consignment" method of marketing, Union purportedly remained the owner of the gasoline, and the "consignee" as its purported agent, sold Union's gasoline. The dealer received a guaranteed commission from Union. Since Union purportedly owned the gasoline and the dealer was merely its purported agent to sell, Union determined [fol. 568] the price at which the gasoline was to be sold.

The written consignment agreement provided that Union would deliver to Simpson such quantities of its branded gasolines as the parties *might from time to time mutually agree;* that title to all gasoline delivered would remain in Union until sold by Simpson. Simpson agreed that he would sell "Consignor's gasoline" at prices authorized by it and Union agreed that it would pay Simpson a commission, computed pursuant to a stated formula.

Simpson had been a salaried employee for Union for about eight years, his last position being that of retail representative in the Santa Maria district. He was familiar with the "consignment" agreement and method; he was told by Union he might lease an available Union station and decided upon a station in Fresno, California. In May of 1956, he secured his first lease, and by renewal his lease ran to May 23, 1958. Apparently until March of 1958 he complied with the terms of the "consignment" agreement and fixed prices accordingly.

On or about March 1958, competitors lowered the price of regular gasoline from 34.9 to 27.9. Union did not permit him to lower his price to 27.9 but insisted he maintain it at 29.9, 2 cents above competition.

Simpson then proceeded to set his own prices for gasoline and from March 1958 to the end of the lease fixed prices without reference to demands or suggestions of Union. He was told that if he did not comply with Union's suggested prices, his lease would not be renewed. Union stipulated in the trial court that when his lease expired it was not renewed because of his violation of the "consignment" agreement and that it was Union's purpose to lease its stations only to "consignees".

The Amended Complaint

Simpson's amended complaint charged Union with effectuating contracts which unreasonably restrain trade and commerce, and with the intent and an attempt to monopolize the sale of gasoline in violation of the Anti-trust laws. The amended complaint charged price fixing, exclusive dealing and coercion in forcing the consignment program on independent service station operators.

[fol. 569] *Plaintiff's Claimed Damage*

Simpson claimed damage in the sum of $1000 for his inability to establish his own retailing prices during the period from May 1955 to March 1958, and claimed damages in the sum of $150,000 alleging he was "unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interest as lessee to a successor of his own choosing, and was prevented from selling his 'good will' and was prevented from obtaining the fair market value of his business".

The State of the Record

The record is not an easy one to read. No written pretrial stipulation of facts was entered into nor was any formal pretrial order made. The trial judge however, filed a memorandum which was helpful.

The Record contains transcripts of proceedings at a pretrial conference on April 30, 1959; a further pretrial conference on May 21, 1959; transcript of proceedings on Union's motion for summary judgment on February 11, 1960; transcript of proceedings on Simpson's motion for pretrial summary judgment on September 16, 1960.

At the pretrial conference on May 21, 1959, the Court suggested that Simpson's counsel submit a statement of the case in factual detail. On June 5, 1959, Simpson filed a "Pretrial Statement for Pretrial Ruling" and an affidavit by Keith, attorney for Simpson, setting forth a series of documents. This statement was before the court on the hearings of the motions on February 11, 1960 and September 19, 1960.

The statement contained the charge that there was an exclusive dealing arrangement, and that lessees were in effect required to buy their gasoline supplies exclusively from the defendant. The statement also charged that the purpose of the defendant in instituting the consignment program, was to control the prices at which independent service station dealers could sell their gasoline. However, there was no concession by Union that the pretrial statement was correct.

At these proceedings before the trial court there was considerable discussion about issues and to say the least, [fol. 570] plaintiff's contentions vacillated. Defendant's counsel was pursuing the customary practice in antitrust cases of segmenting the case into parts as small and precise as possible and then attempting to demonstrate there was nothing of merit in each particular part or segment.

The result of all this was to create a most unsatisfactory record in which plaintiff on one date may have indicated he was not seriously pressing a particular contention and at a later date we find the contention being made. Accordingly in the briefs, Union seeks to pin issues down, based upon some statement made in the transcript and Simpson in the briefs, attempts to argue the full extent of his claim unbound by statements made during the proceedings.

If agreement as to facts or issues are reached in the discussions of the pretrial conference, the better practice is to reduce them to writing in the form of a pretrial stipulation and order. As the record now stands, it is almost impossible to determine what agreements, if any, were reached at pretrial.

Damages

We proceed to the question of damages which is dispositive of this case.

It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be present only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust

laws, but show also the impact of the violations upon him and damage to him resulting from the violations of the antitrust laws.

If Simpson, assuming, solely for this purpose, the illegality of the consignment program, suffered no actionable damage, the judgment for Union must be affirmed.

[fol. 571] Plaintiff has predicated his case on two items of damage—

(1) failure to secure a renewal of his lease, with $150,000 damage alleged, and

(2) "plaintiff was unable to fix the prices of his gasoline during the period from May 1955 to March 1958, to his injury and damage in the amount of $1000".

Failure to Secure Renewal of Lease

As to the first item of damage, the facts are not in dispute. Assuming for argument only that the consignment program is illegal, courts may not fashion a new lease for Simpson. Right or wrong, as far as Union's activities are concerned, Simpson's tenure ended on May 22, 1958.

We agree with Simpson that a cause of action in a private antitrust suit for treble damages is a tort action, *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, (7 Cir. 1943) 138 F.2d 967 at 970; cert. den. 321 U.S. 792, and is not founded on a contract, and that the fact the contract was terminated, the lease ended and all rights of the plaintiff as lessee in the land came to an end in May 1958, is not an answer to the problem.

Simpson alleges that he was "compelled to accept the one year lease" and "compelled to accept the consignment agreement". His first lease began May 23, 1956, and was renewed for one year to expire on May 22, 1958. He alleges that prior to May of 1955, Union had used a policing method to carry out price fixing. He charges in May 1955 Union created the consignment agreement. He alleges this contract was "forced" on the independent stations by Union.

In determining whether Simpson suffered or could have suffered any damage, it would appear a distinction should

be made between the individual, such as Simpson who was entering his first lease with Union in May of 1956 and other individuals who in May of 1956 already were lessees and had been for some time, i.e. already had status as lessees. *Midwest Theatres Co.* v. *Co-Operative Theatres,* (D.C.E. Mich. 1941) 43 F. Supp. 216 at 223-24.

[fol. 572] Simpson knew that by obtaining the lease he would also have to sign the consignment agreement. He had not previously been a lessee. He had freedom of choice to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.

Simpson is therefore not in the position of lessees who had been operating stations under leases from Union and who may or may not have been forced or compelled to sign a consignment agreement as a condition for renewal of their lease. This latter class of individuals had already made an investment in supplies, equipment for their leased stations; had in most cases built up patronage and good will; on the facts in the record might have reasonably anticipated their lease would be renewed from year to year if they performed an adequate job in the service station.

Had Simpson been a member of this class, there might be some merit to his allegations of force and compulsion and his proposed proof of coercion in the acceptance of a renewal lease tied in with the consignment selling program. We do not pass on the question as to these lessees. But Simpson was coming into the leasing business fresh. He had had no former lease agreement.

The law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.

The Restatement on Torts, Sec. 892, states,

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct".

Courts of law do not award damages to the plaintiff who through his own action has brought the alleged injury upon himself.

It thus appears that any damage occurring to Simpson was the result of his own free and deliberate choice and he [fol. 573] could not deliberately and knowingly enter into contractual obligations and then and thereafter contend he was injured by the results of his own acts.

We pass no opinion whether, as a factual matter, dealers in the second category here referred to, i.e. with stations, have been compelled, forced or coerced in their dealings with Union; or if this has happened, what are their rights if any. This decision may await another day with a trier of fact to decide that question.

Inability to Set Prices

What we have said as to Simpson's first specification of damage, also applies to his claim of inability to fix prices.

In addition it should be noted that Simpson alleges he was "unable" to fix the price of gasoline from May 1956 to March 1958. The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958. True he did this at the hazard of failing to secure a renewal. The hazard actually eventuated.

The immediate assumption one makes is that he could have pursued this course of action earlier. His action in March 1958 demonstrates he was not "unable" to fix prices on gasoline.

Simpson was apparently content to let the situation rock along until March 1958. Then he acted.

What he could have earned had he fixed prices on the gasoline from May 1956 to March 1958 is conjectural. Damage in an antitrust case need not be shown to a mathematical certainty. *Karseal* v. *Richfield*, (9 Cir. 1959) 271 F.2d 709. Possibly proof could have been made. But when his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails.

[fol. 574] *Conclusion*

We pass no opinion on the legality of the consignment program.[6] The issue of damages determines this case.

For the reasons stated, the judgment is affirmed.

[File endorsement omitted]

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[6] Two consignment cases are pending before the F.T.C.

In *F.T.C.* v. *Sun Oil Co.*, (1962) Trade Cases, Para. 15,909, an examiner found consignment agreements between Sun and its retail dealers were invalid. The examiner found that the agreements were not primarily to aid the dealers financially as contended, but were entered into "to enable Sun to post uniform lower retail prices throughout the area, increase its share of the market, and attempt to reduce the differential between Sun and the private-brand operators to one cent a gallon". Therefore, there was not a bona fide agency.

As a result of unrealistic tank-wagon prices and leasing arrangements, the examiner found that Sun had economically coerced the dealers into accepting the contracts against their will, although an ostensible choice had been given. The element of coercion was cited as the distinguishing factor between the present case and *United States* v. *General Electric Co.*, (1926) 272 U.S. 476.

In *Atlantic Refining Co.* v. *F.T.C.*, (1962) Trade Cases, Para. 15,786 an examiner found a consignment agreement between Atlantic and its wholesalers, used in meeting a competitive situation, was valid as following the principles of *United States* v. *General Electric Co.*, (1926) 272 U.S. 476.

Insufficient evidence of coercion was found to destroy the validity of the agency agreement.

[fol. 575]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17308

RICHARD S. SIMPSON, Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, Appellee.

JUDGMENT—Filed and Entered January 2, 1963

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellant.

It is further ordered and adjudged that the appellee recover against the appellant for its costs herein and have execution therefor.

[fol. 576] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 577]

SUPREME COURT OF THE UNITED STATES

No. 907, October Term, 1962

RICHARD S. SIMPSON, Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA.

ORDER ALLOWING CERTIORARI—April 29, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office-Supreme Court, U.S.
FILED
MAR 8 1963
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. [redacted] 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Section 2 (15 U.S.C. 2) 3, 4, 5, 31, 33, 35, 37

Rules

Federal Rules of Civil Procedure, Rule 56 4

Texts

12 Am. Jur., Contracts, Sections 217-219, pp. 734-737 29

II Klaus, Sale, Agency and Price Maintenance, 28 Col. L. Rev. 441, cases collected 443-450 39

Restatement of Contracts, Section 492 30

Restatement of Torts:

Section 871, Comment f, pp. 419-421 30

Section 892 ..... 25, 30

21 Congressional Record, 2457, 3140-3150 41

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. _____

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 2, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court in entering summary judgment against the petitioner is reported at

1961 Trade Cases, Para. 69,936 and appears at Tr. 347-360.

The opinion of the District Court in denying petitioner's application for an injunction upon the original complaint, subsequently amended, is reported at 162 F. Supp. 746 and appears at Tr. 42-43.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 311 F. 2d 764 and is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 2, 1963 (R. 575, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether an ousted independent service station dealer has a cause of action against his lessor and supplier under Section 4 of the Clayton Act for damages resulting from its refusal to renew a one year lease because of the dealer's disobedience to price control orders made by the lessor and supplier pursuant to its scheme and plan to fix and control the retail price of gasoline as to 3,000 dealers located in 8 western states by means of a so-called "retail dealer consignment agreement" plan?

2. Whether an independent service station dealer whose gasoline prices were fixed by his lessor and supplier has a cause of action under Section 4 of the Clayton Act against it for damages resulting from the service station dealer's coerced adherence to the supplier's price fixing directions?

3. Whether major gasoline suppliers are liable under the antitrust laws for using a one year lease as a weapon to restrain the independent dealers' ability to sell at prices in accordance with their own judgment to those injured by the weapon or whether the federal courts are allowed to immunize them from liability on the ground of the assumed dealers' consent to be victims of such weapon?

4. Whether petitioner was erroneously deprived of a trial by jury in the light of this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)?

5. Is not respondent's consignment method of fixing resale prices of gasoline sold by some 3000 retail dealers, as enforced and policed by respondent, a per se violation of Seetions 1 and 2 of the Sherman Act?

6. Is not respondent's consignment method of fixing resale prices of gasoline in violation of the Sherman Act because it fixes retail prices of dealers after the risks of title have passed to them?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C., Section 15. These are printed and attached hereto as Appendix C. Federal Rule of Civil Procedure 56 is also printed and attached hereto in Appendix C.

STATEMENT OF THE CASE

A. Nature of the Case.

1. The Pleadings.

This is an action by a service station dealer who had leased a beautiful (Tr. 307) service station site from the respondent, Union Oil Company of California. The complaint was originally for injunctive relief to require respondent to continue to lease the property to petitioner (Tr. 3-36). Petitioner's application for a preliminary injunction was denied (Tr. 44), and petitioner amended his complaint to seek damages under section 4 of the Clayton Act (Tr. 44-45). The amended complaint demanded trial by jury (Tr. 46).

The amended complaint alleged that respondent was engaged in interstate trade and commerce in the production, refining and distribution of petroleum products in eight western states. The complaint alleged that respondent controls the operations of approximately 4,733 service station sites in these states (Tr. 46-59). It is alleged to have had a total volume of sales in 1957, of $436,731,000.00 and marketed 60,404,000 barrels of petroleum products in interstate and foreign trade and commerce (Tr. 49).

The complaint alleged that Union Oil Company acquires possessory interests in service station sites and leases these site to independent dealers, but only on a one-year basis and utilizes the short period of the lease to control the dealers' prices and gasoline purchases, because of the fear of non renewal (Tr. 49, 51, 52).

The complaint alleges that respondent has violated Sections 1 and 2 of the Sherman Act to the injury of petitioner. Petitioner claimed that respondent was in violation of the antitrust laws in the following basic ways: (1) in promulgating and enforcing a retail dealer consignment agreement which purports to allow respondent the right to keep title to gasoline delivered to independent dealers, and directly fix the price the dealer charges to the public (Tr. 51); (2) in adopting the means of requiring new lessees who desired leases from respondent to agree to sign the price-fixing consignment agreement as a condition of obtaining the lease (Tr. 51); (3) in adopting the means of promulgating only one-year leases and utilizing lease non-renewal on existing lessees who were forced, under the possibility of lease termination, to sign the agreement (*Id.*); (4) in requiring the dealers to purchase their requirements of gasolines and oil exclusively from respondent (Tr. 49, 51); (5) in adopting the means of establishing a policing system to make certain that the dealers are following the policies set by Union (Tr. 52); (6) in utilizing the means of ouster from the leased premises of those who refuse to comply with price directions (Tr. 51,

52); (7) in limiting the ability of the dealers to operate profitably by preventing lessees from obtaining good will or the fair market values of their business (Tr. 52); (8) in selling its gasoline to "off-brand" stations who set prices below the prices established by Union, which is known to Union, but who prevents the dealers from meeting this competition (Tr. 52-53); (9) in attempting to monopolize and actually monopolizing the distribution and retailing of gasoline by utilizing its position as a lessor and a supplier to control the retail business of thousands of otherwise independent service station lessees, and depriving them of profits and values that they would acquire but for the monopolization (Tr. 50-53).

The complaint detailed the facts with respect to petitioner's injury (Tr. 54-56).

In March, 1958, a major price disturbance occurred in the petitioner's competitive area (Tr. 55). Prices of regular gasoline were lowered by his competitors from 34.9¢ to 27.9¢ *(Id.)*. Petitioner desired to meet these prices (Tr. 55-56).

The petitioner requested authorization but respondent refused to allow the petitioner to lower his price to 27.9¢ (Id). Petitioner however persisted in meeting the competition and kept his prices at 27.9¢ (Tr. 56). Respondent's agents then demanded that petitioner raise his price to the level established by respondent (Tr. 56). Petitioner was told by respondent that he would be unable to obtain a lease renewal unless he abided by the respondent's price directions (Id). Petitioner persisted in his decision to stay at

the prices of his competition, and on April 21, 1958, he was notified that his lease would not be renewed (Tr. 56).

Petitioner left the premises on June 5, 1958 (Tr. 57).

Petitioner alleged he was compelled to accept the business arrangements offered by respondent (Tr. 57):

> "28. As a direct result of the illegal contracts and plan to monopolize the retailing of gasoline and oil products manufactured and distributed by Union, the plaintiff was compelled to accept a one year lease from the defendant Union, compelled to accept a consignment agreement directly fixing the prices of his gasoline, and compelled to remove himself from the premises on 4010 E. Ventura Avenue, Fresno, California, as of June 5, 1958. That had the plaintiff not been an errant lessee as aforesaid he would have obtained and continued to have obtained successive leases for said property from the defendant."

Petitioner then alleged two claims for damages: (1) He claimed $150,000.00, as a result of ouster from the service station property pursuant to an attempt to control and fix his retail prices (Tr. 57). (2) He claimed $1,000.00, as a result of being unable to fix the prices of his gasoline during the period, May, 1955, to March, 1958 (Tr. 57).

Before answer, the respondent made a motion to dismiss the amended complaint and for summary judgment (Tr. 59). The motion was denied without

prejudice (Tr. 87-88). An Answer was thereafter filed (Tr. 88-106).

The answer admitted petitioner was engaged in interstate commerce (Tr. 88-91). It admitted the promulgation of the retail dealer consignment agreements which gave it the purported right to control retail prices in eight western states (Tr. 91). It attached a copy of the petitioner's consignment agreement to the answer, as Exhibit A therein (Tr. 95-102). It admitted it entered into two one year leases with the petitioner (Tr. 92). It admitted that the authorized price to petitioner was 29.9¢ between February 28, 1958 and March 12, 1958 (Tr. 92). It admitted that petitioner sold regular gasoline at 27.9¢ (Tr. 92-93). It denied that petitioner had requested authorization for this price (Tr. 93). It admitted that it told petitioner he was violating the consignment agreement and that its agent visited petitioner's station and told petitioner that "he would do what he could to cause plaintiff to abide by the terms of the consignment agreement" (Tr. 93). The answer then admitted, at Tr. 93:

> "Answering paragraph 25, defendant alleges that following said conversation, plaintiff refused to comply with his obligations under the consignment agreement existing between the parties and persisted in selling defendant's gasoline at prices at variance with those authorized by defendant thereunder; admits that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant. Except as so admitted, defendant denies the averments of said paragraph 25."

The answer then asserted the affirmative defenses of a prior judgment of the Superior Court of the State of California, in and for the County of Fresno claimed to adjudicate defendant's right to possession of the service station after May 22, 1958 (Tr. 94). It also asserted the affirmative defense of pari delicto (Tr. 94).

2. Pre-trial Proceedings.

The district court ruled that petitioner's discovery should be allowed only after pre-trial conferences were requested (Tr. 106-108). Thereafter, the petitioner, in compliance with this order filed a motion for a pre-trial conference, a statement of issues and agenda, and a statement re damages (Tr. 179, 187, 189, 190, 196). Defendant below filed its statement of issues (Tr. 181-187).

The following thereafter occurred. The first pre-trial conference was heard April 30, 1959 (Tr. 368-392). At this pre-trial conference the District Court was of the view that the parties could stipulate to the basic facts and utilize the interlocutory appeal provisions of the federal rules in order to determine the lawfulness of respondent's retail-dealer consignment program (Tr. 373, 377, 378, 386, 389). The conference ended with the request of the Court that basic facts should be stipulated and that there be a certification of the issues of law based on the stipulated facts as to violation of the antitrust laws (Tr. 391). The stipulations and contentions of Union Oil at the pre-trial conference were that it tied the retail-dealer consign-

ment agreement to the granting of the one year lease (Tr. 380, 387) and that it had the right to refuse to renew leases of those who refused to abide by its authorized retail prices (Tr. 387-388).

A second pre-trial conference was held May 21, 1959 (Tr. 392-407). At this pre-trial conference the parties were unable to agree to stipulations as to undisputed facts. The District Court, upon the contentions of respondent's counsel, that respondent could lawfully, under the Sherman Act, grant only one year leases and then refuse to renew the leases of all those who did not abide by authorized prices, was of the view that respondent was willing to concede the basic issues in the case (Tr. 395-396). It was of the view that petitioner should file a pre-trial statement for a pre-trial ruling on the issue of violation (Tr. 399, 403-406). The statement of respondent's counsel raising this matter was as follows (Tr. 401):

> "The Court. Mr. Lasky, isn't it your contention that even if you do cancel everybody that has a one-year lease and who violates the consignment agreement that you are still entitled to summary judgment?
>
> Mr. Lasky. [Counsel for respondent] Yes."

At Tr. 402:

> "Mr. Keith. [Counsel for petitioner] You specifically said on this issue that you felt it would be legal if the company would refuse to allow a lessee renewal of his lease if he didn't sign the consignment agreement, is that correct?
>
> Mr. Lasky. Yes; I said that. That is my theory. And I also said that even if it were true that

we had refused to renew four or five others for like reasons, it wouldn't make any difference. I said that".

Thereafter, counsel for petitioner filed a pre-trial statement for a pre-trial ruling (Tr. 199-210). Attached to this statement were letters sent by respondent's Sales Manager, Dealer Sales, to the division offices explaining or giving instructions on the retail-dealer-consignment program (Tr. 210-298). The plaintiff's pre-trial statement did not waive trial by jury (Tr. 199).

The defendant below was to move for a pre-trial ruling on this statement, but it did not do so (Tr. 399, 406). Instead it noticed the deposition of the petitioner. Portions of the deposition of petitioner appear in two places, at Tr. 452-493, Tr. 300-329.

Following the deposition, respondent again moved for summary judgment (Tr. 298). The motion was on all issues (Id). At the arguments on the motion (Tr. 407-436), the District Court was again of the opinion that, based on the extensive stipulations of counsel for respondent, issues could be and should be decided by the appellate courts (Tr. 413, 426-427, 435). The Court was of the view that petitioner should file a motion for partial summary judgment on the issue of violation of the antitrust laws (Tr. 426).

The respondent made extensive stipulations at this proceeding at Tr. 409, 415-419, 429.

Subsequent to the motion of defendant for summary judgment, petitioner then filed a motion for

partial summary judgment on the issue of violation of the antitrust laws (Tr. 337). The motion expressly did not waive petitioner's right to trial by jury (Tr. 338). An extensive memorandum in support of the motion for partial summary judgment was filed by petitioner, and its table of contents appears at Tr. 339-343. Following argument on the petitioner's motion (see Tr. 436-441), the District Court ruled in favor of the respondent on all issues and filed an opinion (Tr. 347-360). Judgment was then entered for the respondent (Tr. 360-361). Petitioner entered objections to the entry of judgment (Tr. 361-366).

3. The Undisputed Record in Summary Judgment as to Violations of the Antitrust Laws.

The record thus contains sweeping stipulations by respondent or admissions contained in policy letters or in papers filed by respondent as to the purposes, means used, and effect of its retail dealer consignment agreement scheme (See Tr. 427-428). These may be summarized as follows:

1. The Union Oil Company holds primary possession to 2,003 service stations in the states of California, Washington, Oregon, Nevada, Arizona, Montana, Utah, Idaho (Tr. 333).

2. The Union Oil Company has gasoline supply agreements with an additional 2,116 dealers who either own the outlets or lease them from third parties (*Id.*).

3. The gallonage delivered to the lessee dealers in 1957 was approximately 427,000,000 gallons, and to non-lessees was 90,000,000 gallons (Tr. 334). The total

dollar volume of sales of refined petroleum products in 1957 by respondent was $347,900,000. (Tr. 210).

4. Union Oil Company sold approximately 11.5% of all gasoline sold in the State of California (Tr. 38).

5. At all times, Union Oil Company has sought to lease out to independent businessmen (Tr. 91) its service station sites under a one year lease which requires the lessee to pay rent to Union Oil Company and assume all the risks of the enterprise (Tr. 19-27). The lease of petitioner required the station to be open as much as 16 hours a day (Tr. 23).

6. Union Oil Company would only issue the one year lease (Tr. 214, 395).

7. Prior to 1955 Union did not have consignment agreements (Tr. 91, 343-345).

8. About December, 1954, Union Oil Co. decided to control the retail price of dealers "when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level" (Tr. 223-224). The method used to accomplish this was the Retail Dealer Consignment Agreement (Tr. 223, 224, 224-230). As to this agreement, it was stated:

> "This agreement temporarily suspends our normal buy and sell arrangements on gasoline, making the dealer our agent for the sale of gasoline consigned to his storage.
>
> We will pay commissions of 4½¢ per gallon on 76 Gasoline and 5½¢ per gallon on 7600 Gasoline, regardless of the selling price fixed by us. These

consignment agreements will not alter our rental arrangements; any rental being due from Lessees to Union Oil Company being payable out of the consignment margin. The use of this program must be first approved by Head Office covering each area and it is to be invoked only under extreme conditions" (At Tr. 223-224).

On or about March 10, 1955 it was decided not to make retail dealer consignment a temporary arrangement but to make it permanent. The instructions were that it was to be used when (Tr. 233):

"... when the competitive price condition in certain neighborhoods require a change in our retail selling price, then this plan is adopted for a given trading area, which will comprise all of the area within a marketing station boundary (with the exception of those metropolitan areas divided into economic trading zones), it will be offered to all dealers within the nominated area."

The prices nominated by Union at such time were to be 3¢ over major competition and 2¢ over regular competition (Tr. 231-232). Such price changes were to be made by the hour to follow competitors, but after the "cut price situations cleans up" the prices were then to equal or be above "our former fair traded price . . ." (Tr. 232).

9. The retail dealer consignment agreement is a gasoline products delivery agreement by which the dealer must maintain the trade marks of Union on his pumps and other facilities through which gasolines are dispensed (Tr. 95). It states that Consignor will

agree to deliver and Consignee will receive such quantities of Consignor's gasoline as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business (Tr. 95). Respondent's counsel has stipulated that Union Oil Company will not do business with anyone who violates the terms of the agreement (Tr. 379-380; 401-402; 417-419). The dealer could not under respondent's consignment arrangement repaint the whole station and dispense another company's gasolines at his station without ouster (*Id.*, Tr. 434-435).

10. The retail dealer consignment agreement purports to reserve title to the gasoline in respondent and to allow respondent the right to require the consignee to "sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing" (Tr. 95).

a. The risks of operation, storage, loss, evaporation, taxes and handling charges are on the dealer (Tr. 95-98). The one exception is loss from a natural catastrophe (Tr. 97-98).

b. Consignor agrees to pay property taxes on stored gasoline (Tr. 100).

c. Consignor purported to agree to pay a minimum commission to the dealer (Tr. 99-100), and to allow the dealer the difference between the sales price and the wholesale tank-wagon price as commission (Tr. 99). But the record showed the respondent refused to guarantee the commission. On the contrary respondent felt it would do as it pleased with the dealer's commission.

In February, 1958, respondent determined to do away with the guaranteed minimum commission (Tr. 285). Instead the dealer was given a letter which purported to allow a minimum commission, but the letter gave respondent the right to revoke its provisions at any time by written notice (Tr. 287-288). Under the new arrangement the dealer was to absorb 20% of any reduction between authorized retail price and normal retail (Tr. 285). Normal retail was "$.045 per gallon over Union's Dealer Sales Posted tank wagon price for both Royal 76 Gasoline and 76OO Gasoline" (Tr. 282).

This change in commissions was to be effectuated as follows (Tr. 286):

> "3. You will review the consignment agreements of those dealers who refuse to sign a mutual cancellation of such agreement and you will serve a thirty-day notice of cancellation at the applicable time. After such cancellation you will sign the dealer to the new consignment agreement and give him Letter No. 1 which will be effective as previously stated. It is imperative that you do not miss a cancellation date because by doing so you could delay the effective date of this new commission policy by one year."

On April 15, 1958, the respondent again changed its commission schedules (Tr. 70-85). The consignee was to absorb changes in the retail prices by a sliding scale which provided for dealer absorption of 20% of any reduction in price below normal retail (Tr. 82-85). The instructions of respondent continued to be "There

will no longer be minimum commissions shown in the Consignment Agreement" (Tr. 76). Again, the respondent reserved the right to terminate the commission at any time by written notice (Tr. 79). The change in the consignment agreement was to be accomplished as follows (Tr. 77-78):

> "1. New dealers will be signed to the new agreement and concurrently therewith they will be given the special letter which will be effective until all retail consignees in a specified geographical area are signed to the new Consignment Agreement.
>
> 2. Our present dealers will be urged to sign the new Consignment Agreement immediately and concurrently therewith we will give them the special letter which will be effective as set forth for new dealers.
>
> 3. A thirty day notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give the special letter which will be effective as previously set forth herein."

d. The record showed that the dealers paid respondent for the gasoline at the time of delivery for the delivered gasoline (Tr. 170-171, Tr. 80). The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied (Tr. 311). Thereafter the dealer paid respondent when the gasoline was delivered to him (Tr. 170-171, Tr. 80).

The dealer pays the respondent the authorized price for gasoline, less his commission, but his commissions are dependent on the difference between the wholesale tank-wagon price and the authorized or minimum retail price (Tr. 99-100). When authorized prices were lowered by the respondent to a point below respondent's posted minimum price, the dealer thus absorbed 50% of the difference (Tr. 100).

e. The agreement runs from year to year until cancelled by either party on thirty day notice after the end of the initial term or at consignee's loss of right to occupancy of the premises (Tr. 101).

11. The purpose of the retail dealer agreement was, among other things, to control retail sales price (Tr. 415; 429).

12. The consignment agreement program was used to fix uniform and non competitive prices in the western states. At times the prices authorized were to be established by what Standard Stations, Inc. charged (Tr. 223, 231-232; 246-248; 256; 281-288; 70-86). The dealers' prices "were to equal predominant competitive major prices or Standard Stations, Inc. prices if latter are lower" (Tr. 283, 75). The dealer could not match the off brand dealer's prices, if desired (Tr. 281-288; 70-86).

13. The authorized consignment agreement prices ordered by respondent on the dealers were to be policed by Union personnel. On April 7, 1955, the General Sales Manager, Dealer Sales, wrote his division officers, as follows (Tr. 247-248):

> "We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Rep and the Sales Manager are carefully policing the establishment of a new nominated price for any service station so that they know it conforms with our instructions as outlined above."

Authorized prices were established by four methods: by price authorization letters (Tr. 273); by telephone calls, by visits to the station of the agents of the respondent and by the gasoline delivery ticket given at the time of delivery of the gasoline to the dealer (Tr. 489).

14. In order for the independent business man to lease a service station property from Union Oil Co. he had to agree to sign the retail dealer consignment agreement. This is stipulated (Tr. 417-418). The dealer "either takes the package deal or he doesn't take the gasoline station" (*Id.*). In the words of respondent's counsel, "either he took our consignment contract and our lease or we wouldn't deal with him" (Tr. 380). By the fall of 1956, the respondent determined to have a 100% consignment program (Tr. 277-278). The company's instructions were as follows, Tr. 278:

> "Our attempt has been to strenuously solicit the change over from the products contract to consignee agreements and this effort must be continued and accelerated as we expect that in the

near future we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business.

In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two party deal or 'other' and the only paper we will write is a one-year consignment agreement."

15. The one year leases of the respondent would not be renewed with a dealer who refused to follow the price fixing directions of the respondent. This is stipulated (Tr. 409; 401; 429; 417-419).

16. The policy of the respondent, however, is to renew the one year lease on a continual basis with all those who do follow Union's policies (Tr. 441, 450-452).

17. It is stipulated that the respondent refused to renew petitioner's lease because he violated the price fixing orders of the respondent and persisted in attempting to establish retail prices of his own judgment (Tr. 409; and see Tr. 299).

18. By 1957 the respondent had achieved virtually 100% control of the prices of the lessee dealers and non-lessee dealers (Tr. 334).

Out of a total of 2,003 lessee dealers in 8 western states, 1,978 were on retail price fixing consignment (Tr. 334).

Out of a total of 2,116 non-lessee dealers, 1,327 were on retail price fixing consignment (*Id.*).

19. The effect of the retail dealer consignment agreement was to eliminate competitive gasolines from the stations controlled by independent businessmen but under a consignment agreement with Union. In 1957 respondent sold a total of 392,000,000 gallons of gasoline in the State of California to 2,365 stations (Tr. 334). At 2,364 stations there were no other gasolines dispensed (Tr. 336-337).

20. The retail price fixing program of respondent was carried out despite the fact that it owned service stations itself (Tr. 333), operated a chain of off brand service stations in the State of California, known as Westways (Tr. 446-449); and distributes thousands of gallons of gasoline to off brand companies (Tr. 335-336) who retail gasolines at prices below the authorized prices of Union (Tr. 494, 508; Tr. 527, 532; Tr. 539, 545).

The deposition of the Sunland representative disclosed that respondent's agent in Fresno had a conversation with the Sunland official about the price war in the area of petitioner's service site at 4010 E. Ventura Ave., Fresno, California in 1958 (Tr. 516). The representative testified that all the oil companies were "working" to bring the price back up (Tr. 517, 518).

4. The Record as to "Consent" of the Petitioner.

The record shows the following testimony by petitioner in his depositions.

(1) At the time of the signing of the one-year lease in May, 1956, and the retail-dealer-consignment agreement, petitioner said, "Do I have to sign this . . . knowing that I had to . . . " (Tr. 309).

(2) At the time of the expiration of the first one year lease, around May, 1957, petitioner protested the consignment agreement (Tr. 475). Petitioner specifically testified that he "didn't want it" (Tr. 475). As far as Union's representative was concerned petitioner had to be on consignment (Tr. 475).

(3) Petitioner requested that he be allowed to become a purchase and sale dealer (Tr. 475).

(4) Petitioner constantly protested the margins he was receiving (Tr. 461, 462, 469).

(5) Petitioner desired to set his own prices at all times (Tr. 316).

(6) Petitioner kept his retail prices at the level of his competitors in March, 1958, despite demands by Union that he abide by its price directions. The Union representative told petitioner (Tr. 485):

> "I refused to put the price back up, and he said that he was going to call Los Angeles, and Mr. Rath and do everything in his power to force me to put the price back up . . . "

(7) Petitioner protested the lease ouster and did all he could to maintain himself as a lessee. Between the time of his notification of lease cancellation, on April 21, 1958, and the filing of his complaint for injunctive relief on May 21, 1958, petitioner attempted to obtain a change in respondent's determination to oust him by urging public support for his position

(Tr. 37-42). He solicited letters to be sent to the Chairman of the Board of Union Oil Co. (*Id.*). Respondent received 230 letters supporting petitioner's ability and position (Tr. 39).

Respondent, however, refused to change its position and dispatched its General Sales Manager, Dealer Sales (Tr. 37), Mr. Rath to visit petitioner, to warn him not to oppose Union. Petitioner testified he was told as follows, Tr. 479-480:

> "Q. And what did you say to Mr. Rath and what did he say to you?
>
> A. I don't recall the exact words at all, but he came there that day. He had to come around about 4:00 o'clock to get in the place, because it was impossible to get—to come in the front way, and he remarked that they had me pretty well blocked off. They even had saw horses across the street that he came down, and after pleasantries, he wanted to know how I was; he said that he heard that I had planned not to leave the service station when my lease was up, and I said, well, I didn't know where he had heard it, but he said, 'Well, you are going to have to leave.' I said, well—I said very little. As a matter of fact, Mr. Rath did most of the talking, but I recall that he told me about two dealers down in Los Angeles that had refused to leave, and he said that they had thrown them out bodily, and he said that he, through his past associations and knowing me, didn't want to see me get hurt. And he also said that the Union Oil Company had a lot more money than I did, and that it was foolish for me to try to sue them or anything, because I didn't have the money. And he said, 'You are going to go out when your lease is up, within the hour," as I recall, or words to that effect. Immediately,

anyway. And I said, 'Well, maybe so, but you had better keep it legal.' And he said, 'Whether we do or not, you are going to go out.' So that is mainly what I remember about the last conversation."

Petitioner was specifically told by respondent that if he did conform to authorized prices it would be recommended that his lease would be renewed (Tr. 491-492).

The lease of the petitioner provided he was to keep the business open 16 hours a day, every day of the week (Tr. 29, 31-32). Petitioner worked this time entirely by himself with only 14 days off work in the two years (Tr. 40, 67).

Following his ouster he leased a Mobil service station on July 3, 1958 (Tr. 321). He went into partnership with another person, thus reducing his income by one-half of that shown at Tr. 323.

5. The Opinion Below.

The Court of Appeals did not reach the issue of violations of the antitrust laws, but assumed such violations. It ruled on the issue of whether or not petitioner had actionable damages under the Clayton Act. It ruled that it was proper for an appellate court to classify the dealers of the respondent to determine whether or not there were categories of dealers who could not claim damages for forced ouster and the destruction of their free choice in prices and products. It found such distinction between dealers who knew that there would be a consignment agreement to be signed when they sought the leases of the service sta-

tion sites offered by Union Oil Co. and the dealers who were already on the service stations sites when it was proposed that they become consignees. It held that a dealer in the former classification had no actionable damages since "He had freedom to accept or reject the tendered lease and consignment agreement" (p. 8). It placed petitioner in this category although his ouster was made after the parties had entered into a separate and new lease in May, 1957 and his ouster followed his occupancy under the second lease. It applied the tort doctrine of "consent," Restatement of Torts, Sec. 892, to a private antitrust action by one claiming to have been coerced into accepting a price fixing agreement as a condition to obtaining lease occupancy and to one who was ousted after his determination to fix prices in accordance with his own judgment against the threats of the respondent that he could obtain lease renewals only if he abided by its price fixing directions.

It ruled as to each of petitioner's damage claims, holding they were thus not actionable. As to the damages claimed for the loss of his business he had spent sixteen hours a day for two years to build up, the Court ruled that petitioner came to Union with his eyes wide open that his prices were to be fixed which prevented recovery. As to the claim for damages as a result of being unable to fix prices in accordance with his own judgment while conducting his business, the Court ruled that there was no "inability" to fix prices at his desired levels since he was free to fix prices even though the risk was that he would be unable to obtain lease extensions.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT AND THE PURPOSES OF CONGRESS IN ENACTING SECTION 4 OF THE CLAYTON ACT TO PROTECT VICTIMS OF FORBIDDEN CONDUCT IN VIOLATION OF THE SHERMAN ACT.

A. A Record Showing Coerced Tie-ins, Threats of Ouster Unless Prices Are Followed, Actual Ouster Because of the Exercise of Free Judgments; All Shown to Be Part of a Scheme to Control Retail Prices of 3000 Dealers, Absolutely Precludes the Doctrine of Consent. There Is No Free Consent When Coercion Is Used by a Supplier, and the Act Protects the Victims of Coercion. There Is No "Ability" to Fix Prices Under Congressional Concepts of Industrial Freedom When the Alternative to the Exercise of Free Judgment Is Loss of Your Business. The Power to Lease Is Not the Power to Coerce Price Uniformity and Preclude the Public From Price Competition in Eight Western States.

1. The Sherman Act Prohibits the Use of Coercion to Obtain "Consent" Which Restrains the Freedom of the Trader to Sell in Accordance With His Own Judgment.

It is respectfully submitted that the doctrine of "consent" has no place in the judicial enforcement of the private antitrust action. A cause of action under Section 4 of the Clayton Act is established upon the proof of injury resulting from anything forbidden in the antitrust laws. This Court has held that the plaintiff's "claim need only be tested under the Sherman Act's prohibition on unreasonable restraint of trade, and meet the requirement that petitioner has thereby suffered injury" *Radovich v. National Football League,* 352 U.S. 445 (1957) at 453.

Congress has in the Sherman Act, it is respectfully urged, legislated an "anti-consent" statute. Thus one

of the objects of the Congress in the antitrust laws is to prohibit those with industrial power from using their power to obtain the consent of traders to the restraint of trade and their injury. The basic principle is set forth in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958). The Sherman Act protects the freedom of traders to sell in accordance with their own judgment.

Thus the Congress prohibits obtaining the trader's consent by coercive means. Examination of antitrust violations will usually involve the use of coercive power to defeat Congressional policies of free trade. It is respectfully submitted that the doctrine of "consent" is as inapplicable to the Sherman Act as it would be to statutes aimed at abolishing the doctrine of assumption of risk in federal workmen safety acts.

A party who has suffered injury as a result of forbidden practices may thus obtain damages as a matter of Congressional determination to keep the channels of interstate commerce free from obstructive conduct. The plaintiff's knowledge or lack of knowledge of defendant's violation of the antitrust laws would, it is respectfully submitted, be irrelevant to this Congressional purpose. The concern of the Courts, it is urged, is to determine whether or not the private plaintiff was a victim of forbidden practices which crippled his freedom of judgment. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1945).

2. The Decisions of This Court and the Circuit Courts have Consistently Allowed Private Antitrust Actions for (a) Damages Based on Extensive Injuries Suffered From the Cancellation of Business Relations Pursuant to Unlawful Plans or Schemes or Objectives Despite Contractual Provisions and (b) Damages Based on Injuries Arising From the Use of Economic Coercion to Require the Independent Business Man to Forego Free Judgments as to Prices and Products.

The action of petitioner is based on the attempt by respondent to unsuccessfully obtain petitioner's consent. Petitioner was threatened with lease ouster unless he followed price directions, and upon the exercise of his independent judgment, he suffered the consequences. To deny a cause of action arising from the enforcement of a coercive price fixing program would appear to be in direct conflict with the decisions of this Court. The cancellations of business relations pursuant to an illegal scheme to fix and control prices or obtain control of the market subjects the violators to treble damage actions.

Ramsay v. Associated Bill Posters, 260 U.S. 501 (1923); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951); *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962); *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558 (1951); see *United States v. General Motors Corp.* (7th Cir. 1941) 121 F.2d 376. See also *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594 at 625.

The denial of both damage claims here is in conflict with *United States v. Richfield Oil Co.,* 343 U.S. 922 (1952), affirming per curiam, (D.C. So. Cal.,

1951) 99 F. Supp. 280, and those cases which allow an action under Section 4 of the Clayton Act based on the utilization of coercion to interfere with free judgments as to prices and products. Clearly the Court below is in error in not holding economic coercion actionable on the part of the victim. *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390 (1906); *Thompsen v. Cayser,* 243 U.S. 66 (1917); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947); *Eastman Kodak Co. v. Southern Photo. Materials Co.,* 273 U.S. 359 (1927); *Ring v. Spina* (2nd Cir. 1945) 148 F.2d 647; *Jewel Tea Co. v. Local Union's, etc.* (7th Cir., 1960) 274 F.2d 217; *Hartford Empire Co. v. Glenshaw Glass Co.* (W.D. Pa. 1942) 47 F. Supp. 711; *Allgair v. Glenmore Distilleries Co.* (S.D. N.Y. 1950) 91 F. Supp. 93, 96.

The common law has always recognized the distinction between those in pari delicto and those whose consent has been obtained by coercion. 12 Am. Jur., Contracts, Sections 217-219, pp. 734-737.

The learned Court below, in allowing lease ouster to be used as a weapon by respondent without liability, is in conflict with the decisions of other circuit courts which apply this distinction. As the Second Circuit stated in *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647 at 652:

> "Thus, it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dis-

missal. Victor Talking Machine Co. v. Kemeny, 3 Cir., 271 F. 810, Straus v. Victor Talking Machine Co., 2 Cir., 297 F. 791; Connecticut Importing Co. v. Continental Distilling Corp. v. Connecticut Importing Co., 2 Cir., 129 F. 2d 651, certiorari denied . . ."

See especially *A. C. Becken Co. v. Gemex Corporation* (7th Cir., 1959) 272 F. 2d 1; *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F. 2d 832, cert. denied 366 U.S. 963 (1961), discussed below.

The Restatement of Torts, Sec. 892, used by the Court below applies to consent only when "freely" manifested. Restatement, Sec. 892, excepts from the doctrine of consent those instances where duress has been applied. (See also Restatement of Contracts, Sec. 492). Yet duress as it relates to property interests is not limited to fear of bodily injury, but may be applied to cases in which threats of unlawful conduct directed against the other "deprives the other of a freedom of choice." (Id, at Sec. 871, comment f, pp. 419-421).

Further, the Restatement of Torts specifically states that that "consent" cannot be applied to those who are the subject of statutory protection. (Restatement of Torts, Sec. 892, p. 490).

B. The Action Below Involves Practices Engaged in to Restrain Free Judgments as to Prices and Products.

1. The Violations of the Antitrust Laws by Respondent Show Coercion as a Matter of Law.

The respondent below invites the small business man to lease its properties, pay it rent or enter into

gasoline supply contracts with it. It is respectfully urged that the action below involves purposes, means and effects which are in violation of the antitrust laws precisely because respondent denied free choice or free consent. These violations may be summarized as follows:

1. The means used by respondent to effectuate the retailer-dealer consignment agreement program are illegal per se under Section 1 of the Sherman Act, regardless of the validity of the consignment agreement and whether or not there has been an attempt to monopolize:

(a) The use of threats of lease ouster unless price-fixing directions are followed applied to independent dealers to control their free choice of prices, is in violation of the Sherman Act. *United States v. Richfield Oil Co.*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280; *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beach-Nut Packing Co.*, 257 U.S. 441 (1922).

(b) The actual cancellation of leases or other agreements with independent dealers because they refuse to abide by the terms of a price-fixing scheme used to control the free exercise of judgment as to prices charged the public is in violation of the Sherman Act. *United States v. Richfield Oil Co.*, supra; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *United States v. Parke, Davis and Company*, supra; *Kiefer-Stewart*

Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

Judge Yankwich held in *United States v. Richfield Oil Co.* (1952) that lease ouster could not be a means to effectuate agreements in restraint of trade on independent dealers. The question to Judge Yankwich was, 99 F. Supp. at 290:

> "So we come to the question: Is the independence, both legal and factual, created by the lease destroyed by the oral agreements and conditions superimposed by Richfield and which binds the lessee to the distribution of Richfield petroleum products and Richfield sponsored TBA products under penalty rigidly enforced—as the record shows,—of ouster unceremonious on 24-hours' notice, sometimes effected between sundown and sunup of successive days?"

The answer was set forth in the conclusions of law, as follows, 99 F. Supp. at 297:

> "(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessees of L-O stations illegal restrictions as to the types of petroleum and sponsored TBA products to be handled on the premises."
>
> "(6) Richfield should be prohibited from using the 24-hours' termination clause at all to enforce its restrictive conditions as to the products sold on the premises."

The use of threats by Richfield to cancel all agreements with the master dealers who held leases or ownership of their property independent of Richfield

was labeled "coercion" by Judge Yankwich, 99 F. Supp. 295-296.

This Court has held that a corporation could announce to the trade its resale price policies and refuse to do business with those considered opposed to the policies. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960). This is limited to a simple announcement to the trade of the manufacturer's price policies and a simple refusal to sell. But here respondent not only refused to sell gasoline; it refused to allow petitioner an opportunity to carry on his business as a lessee of the property at 4010 E. Ventura Ave., Fresno, California, after threats that unless he conformed he would be ousted (Tr. 485). This ouster was to make petitioner a conspicuous example to all dealers. This is beyond the limited dispensation of *Parke, Davis*.

(c) The respondent tied the gasoline products consignment agreement to the lease, thus coercing judgments at the inception of the enterprise in violation of the Sherman Act. *United States v. Richfield Oil Co.*, supra; *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Loew's, Inc. v. United States*, 371 U.S. 38 (1962).

In *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953) the Court stated, as pointed out in the *Northern Pacific* decision, at 605:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of the buyers' independent judgment as to

the 'tied' product's merits and insulates it from the competitive stresses of the open market." (Emphasis added.)

(d) The use of a strict price-compliance program involving the policing of prices, the reporting of errant dealers and the cancellation of business arrangements with those errant dealers, is unlawful under the Sherman Act. *United States v. Parke, Davis and Company*, supra; *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *American Tobacco Co. v. United States* (6th Cir., 1944) 147 F. 2d 93 at 113, affirmed, 328 U.S. 781 (1946); See also *Emich v. General Motors Corp.*, 340 U.S. 558 (1951); *United States v. General Motors Corp.* (7th Cir., 1941) 121 F. 2d 376.

The system used by respondent "necessarily constrains the trader." *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 at 454 (1922).

2. The driving out of the service station properties worthy men who have spent years and invested thousands of dollars to obtain a business is within the purposes of Congress as condemned conduct when the result of unlawful schemes. *United States v. Richfield Oil Co.*, supra; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941) *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962); *Radovich v. National Football League, et al.*, 352 U.S. 445 (1957).

The recent decision of this Court in *Federal Trade Commission v. Sun Oil Co.*, ____ U.S. ____ (1963)

specifically protects the independent dealers from discriminatory conduct engaged in by their suppliers under the antitrust laws.

3. The respondent has violated the Sherman Act because its purpose was to fix and maintain noncompetitive prices among three thousand dealers in interstate trade and commerce, and it used consignment as a guise to fix the amount the consumer shall pay, eliminating all competitions and enforced by the above means. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. General Electric Co.*, 272 U.S. 476 (1926).

4. The respondent has violated Section 2 of the Sherman Act because it has attempted to monopolize the interstate retailing of petroleum products at 3000 retail facilities in eight western states by controlling the prices, products and profits of these independent dealers. A violation of Section 2 of the Sherman Act occurs when one with the power to do so embarks on a plan or scheme to control an appreciable segment of interstate trade and commerce. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The attempted monopolization was 100% successful here. Within two years respondent had acquired control over the prices and gasoline products of 3305 dealers out of a total of 4119 (Tr. 332-334). Such a segment of

commerce constitutes a separate monopolization. Thus in *Standard Oil and Standard Stations, Inc. v. United States,* 337 U.S. 293 (1949) this court held that the control of the purchases of 6000 independent dealers constituting 16% of all outlets in seven western states (337 U.S. at 295) involving $58,000,000.00 of gasoline was in substantial lessening of competition or tending to create a monopoly under the terms of Section 3 of the Clayton Act, 15 U.S.C. § 14.

This action involved price as well as gasoline product control at approximately 3300 outlets involving a total of approximately 500,000,000 gallons of gasoline in eight western states (Tr. 332-334).

Predatory weapons were used to obtain this control as has been seen. Courts have held that the control of price judgments of all dealers inevitably results in the concentration of business in the hands of the few and may also result in the giving to a single corporation such a unification of interest or management as to constitute illegal monopoly. *American Tobacco Co. v. United States* (6 Cir., 1944) 147 F. 2d 93 at 113, citing *United States v. Eastman Kodak,* 226 Fed. 62, 77, 78. In *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922), this Court held that the control of the prices of the retailers there by the supplier was within the provisions of the Federal Trade Commission Act's prohibitions because "of its dangerous tendency unduly to hinder competition or create a monopoly," 257 U.S. at 454.

Even if the 100% control of 3300 independent outlets by predatory means is not deemed actual mono-

polization, the power such control allows respondent, together with the showing that predatory means have been used to obtain it, is a showing to the Court that a plan is underway to obtain control over entry into distribution and retailing of gasoline products by one controlling 11.5% of the gasoline sales in the State of California with a half a billion in assets (Tr. 211, Tr. 38). As such the courts are to nip the plan in the bud. *United States v. Aluminum Co. of America* (2nd Cir., 1945) 148 F. 2d 416 at 431-432. *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959).

5. Regardless of the purposes of the respondent it has restrained freedom of trade in violation of Sections 1 and 2 of the Sherman Act because the effect has been to place in the channels of interstate trade, 3300 price-fixing agreements and exclusive gasoline-supply agreements which deprive the public of competition and the dealers of a competitive market. The effect has been shown to be the fixing of non-competitive prices and to shut out the market to competitive suppliers. *United States v. Masonite Corp.*, 316 U.S. 268 (1942); *Standard Oil of California v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Co.*, 343 U.S. 922, affirming per curiam, 99 F. Supp. 280.

Clearly, the free judgment of the service station dealer has been restrained as follows: (1) the dealer has had no choice of freedom to bargain for more than a lease of one year's duration; (2) the dealer has had no choice to become a purchase and sale vendor, he has had to sign the consignment agreement to become a

lessee; (3) after occupancy at the station he has had no free choice to terminate consignment agreements and become a purchase and sale dealer; he was told that the only paper Union would write was consignment; (4) the dealer has had no free choice to set retail prices of his own judgment because if he did he knew he would lose his business; (5) the dealer has had no free choice in rejecting Union's gasoline deliveries and to take on a purchase and sale agreement with another supplier because if he did he would be violating consignment and he would lose the business.

2. Assuming the Means Used by Union Were Not Coercive, the Retail Dealer Consignment Agreement Was a Guise to Fix Price and Petitioner Was Entitled to Be Free of Its Restrictions Without Fear of Lease Cancellation.

Even assuming a free choice to do business with Union does not include a right to be free of a tie-in and lease cancellation program, the retail dealer consignment agreement itself is unlawful retail price fixing.

That the respondent had not promulgated a true consignment agreement would appear evident from the facts showing that the risks of title were on the dealer. He absorbed price declines; the respondent refused to commit itself to a guaranteed minimum commission. The risk of theft, evaporation and loss were borne by the dealer except as to natural catastrophies. He alone shared the expenses of storage, handling, insurance. The one exception was the property tax. The consignee paid for gasoline when it was

delivered. The commission paid was simply the margin between tank wagon and retail price.

But when the purpose of a consignment agreement is to fix prices and the agreement is used to fix and establish noncompetitive prices between 3000 dealers the program is in restraint of trade. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Agency is not construed when the clear purpose is to control prices of resellers. See *Klaus, Sale, Agency and Price Maintenance: II*, 28 Col. L. Rev. 441, cases collected 443-450.

In *United States v. General Electric Co.*, 272 U.S. 476 (1926) this Court held a true consignment agreement by a patentee with its 21,000 dealers throughout the country was not in restraint of trade. But the very factors provided by General Electric in the consignment agreement were ignored by Union Oil Co. There General Electric assumed all the risks of "price decline" and carried whatever insurance was carried on the stocks of lamps in the hands of the agents and paid whatever taxes were assessed (Id. at p. 483). This is simply not the case with respondent here who requires the dealers to absorb price declines, to pay all the insurance and to pay all taxes except the property tax. This Court held that the General Electric plan was designed to sell to purchasers through agents. Respondent's plan on the other hand was to control prices in a soft price market (Tr. 223-224). Thus in *United States v. Masonite Corp.*, 316 U.S. 265 (1942) this Court held that the federal courts are bound to analyze marketing systems in terms of the

significance of the business practices as restraints of trade. The consignment agreement here is an avowed price-fixing program, and not one to validly transfer risks between dealer and supplier.

II.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE INTERPRETED CONGRESSIONAL PURPOSES IN THE ENACTMENT OF SECTION 4 OF THE CLAYTON ACT AS PROVIDING A STATUTORY CAUSE OF ACTION DESIGNED TO ALLOW RECOVERY TO THOSE WHO EXPERIENCE THE IMPACT OF VIOLATIONS OF PUBLIC LAW AS DETERMINED BY THE CONGRESS AS GUARDIAN OF INTERSTATE TRADE AND COMMERCE.

A. This Court Has Expressly Held That the Conduct of the Plaintiff, Even If in Violation of the Antitrust Laws, Does Not Immunize the Defendant From Liability.

The doctrine of "consent" as used below immunized conduct forbidden by the Congress from those injured by it. This is, it is respectfully urged, beyond the teachings of this Court. This Court has held that the conduct of the plaintiffs, albeit unlawful in violation of the antitrust laws, could not immunize defendants from those they injure. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1950); *Moore v. Mead's Fine Bread Company,* 348 U.S. 115 (1954).

An agreement with an injured plaintiff does not provide a shield to a Section 4 action. Rather Congress has clearly imposed the right and declared the remedy of redress for injuries suffered from violation of the antitrust laws. *Bruce's Juices Co. v. American*

Can Co., 330 U.S. 743 (1947); *Kelly v. Kosuga*, 358 U.S. 516 (1959).

B. The Decision of the Court Below Not Only Immunized the Defendant From Liability, But Erroneously Assumed That the Federal Courts Have No Right or Duty to Prevent Violators From Continuing a Scheme in Restraint of and Monopolization of Interstate Trade and Commerce Upon Suit by an Injured Victim.

1. A Short Term Lease May Not Be Used to Gain Control of 3000 Business Men and be the Instrument to Allow the Ability to Regiment a Marketing System and Dictate Access and Entry to the Market Place.

It is respectfully urged that the federal courts are to utilize all their power under the Sherman Act to uproot all the parts of the illegal scheme brought before them and to deprive the violators of weapons shown to have been used to restrain trade and monopolize trade. 21 Cong. Record 2457, 3140-3150.

The injury to the petitioner arose because of the use of a short-term lease to effectuate control of his price judgments. As such, the courts below should have determined if the leases of Union were being used as a weapon to promote price control on independent dealers. If so, they could have fashioned a new lease based on uprooting the ability of Union to utilize such a weapon. They should have allowed petitioner an action for damages for compensation based on his right to occupy the station for a reasonable period of occupancy, absent respondent's illegal plans. This is consistent with the decisions of this Court. *Eastman Kodak v. Southern Photo Materials Co.*, supra; *Poller v. Columbia Broadcasting Co.*, supra; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

The failure to strike down the weapons of restraint and monopoly used by the respondent gives it an immunity which increases, it is respectfully urged, its ability to monopolize the distribution and retailing of petroleum products.

III.

THE DECISION OF THE LEARNED COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT HOLDING A SERVICE STATION OPERATOR HAS A CAUSE OF ACTION AGAINST HIS SUPPLIER WHEN IT USES THE WEAPON OF CANCELLATION OF THE LEASE TO EFFECTUATE RESTRAINTS OF TRADE.

The decision of the learned Court below is also in conflict with the decision of the Fourth Circuit in *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied 366 U.S. 963 (1961). It was there held that the attempt to control the dealer's judgments as to purchases of automotive accessory products by pressure, threatened loss of the dealer's lease and final ouster was unlawful and raised a treble damage action. (See remand (D.C. Md., 1962) 207 F. Supp. 856.)

The decision below would further appear inconsistent with the decisions it cites before the Federal Trade Commission. *F.T.C. v. Sun Oil Co.*, 1962 Trade Cases, Para. 15,909; and *Atlantic Refining Co. v. F.T.C.*, 1962 Trade Cases, Para. 15,786. The private action under the antitrust laws aids and implements the governmental enforcement agencies in preserving freedom of trade. These F.T.C. actions would seem to

be brought for the protection of the dealers against coercion by the major oil companies. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

The opinion of the Fourth Circuit shows that the doctrine of "consent" is inapplicable to the private antitrust suit brought by a dealer against the major oil companies for the coercing of his judgments.

The Fourth Circuit stated, 286 F.2d at p. 836:

> ". . . The findings compel the legal conclusion that such an agreement, arrangement or condition existed, and that if a dealer desired to continue selling Sinclair gasoline under the lease and sales agreements, *he had no choice* but to buy, as well, substantial quantities of Goodyear TBA."

At 839:

> ". . . As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement with this particular plaintiff to buy Goodyear TBA, made after the cancellation of his first lease, in order for the plaintiff to be restored as a gasoline dealer. This case is not within the Colgate doctrine."

These statements would manifestly apply to Mr. Osborn whether or not he was an incoming dealer or one on the station when the changed plans took place. Further, the petitioner here, like Mr. Osborn, was allowed a lease renewal only on condition that he accept the tie-in program (Tr. 278, 475).

The opinion of the Hearing Examiner in *F.T.C v. Sun Oil Co.*, supra, also points out that Sun Oil economically coerced its dealers. The examiner stated, at p. 13:

"The election offered was only in theory and not in reality. Clearly there was no real choice between accepting commission consignment and economic failure. Instead of assisting the dealers as claimed, the program *forced* them to bear part of the costs of the plan to increase Sun's gallonage. Because of the power inherent in Sun as a result of its sales contracts and leases with the dealers, as well as their inability to compete with Sun at its lower prices if they purchased gasoline at the prevailing tankwagon price, the dealers were *economically coerced* into accepting commission consignment." (Emphasis added.)

IV.

THE PETITIONER COULD NOT HAVE HIS RIGHT TO TRIAL BY JURY DENIED IN A SUMMARY JUDGMENT PROCEEDING WHICH DISCLOSES THAT ISSUES OF FACT ARE IN DISPUTE ON THE GROUND USED TO DENY A CAUSE OF ACTION.

The decision below in affirming a judgment in summary judgment by resort to an affirmative defense is in conflict with the decisions of this Court which grant to the private plaintiff a right to a decision on the merits under the Clayton Act and the United States Constitution. *Radovich v. National Football League,* 352 U.S. 445 (1957); *Klor's, Inc., v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Poller v. Columbia Broadcasting Co.,* 368 U.S. 464 (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690 (1962). Certainly the most that may be said as to "consent" if not erroneous, is that as an affirmative defense it raises issues of fact. But such issues are

decided by the triers of fact. Nowhere had petitioner waived any rights to such trial on the merits. Petitioner's position was simply that respondent had violated the Sherman Act to his injury as a matter of law based on the stipulations of respondent and the record in summary judgment. Defendant is not entitled to a summary judgment based on an erroneous concept of "consent" to be victimized as a matter of law. At most the defense would raise fact issues.

V.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE ESTABLISHED STANDARDS IMPOSED BY THIS COURT THAT APPELLATE COURTS ARE NOT TO DECIDE ISSUES OF FACT.

A. The Petitioner Was Deprived of a Fair and Just Review of the Evidence.

1. As a Factual Matter, Petitioner Was Not Given Any Opportunity to Consent to Respondent's Violation of the Antitrust Laws, and He Did Protest to the Respondent That It Was Engaged in Practices Injurious to Him.

The Court below, it is respectfully urged, did not review the record to determine the facts with respect to petitioner's alleged "consent" with all inferences and presumptions in favor of petitioner. As such it was in clear conflict with *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). But the record showed that any consent was coerced by respondent; and that respondent, indeed protested the coercion. He merely wanted to stay in business as a dealer at a beautiful service station in Fresno, California, controlled by Union Oil Com-

pany who wanted its gasolines dispensed there by dealers who assumed all the risks of the enterprise, but who would submit to price and product control.

The facts of coercion and protest are set forth in the Statement of the Case herein at pages 21 to 24 as to petitioner's claim for damages arising from ouster. It is significant here to point that the genesis of the action was petitioner's protest over the consignment agreement program and its effect on him. He did not merely protest, he organized a campaign as best as a dealer in his circumstances could muster to keep the station. He organized a public campaign to show confidence in his business abilities to convince someone, somewhere in the Union Oil Company that it should change its mind and renew the lease and let him remain a dealer. (Tr. 40-43.) Two hundred and thirty customers supported his campaign. (Tr. 39.) Clearly, petitioner was not a consenter, and not one to bring about a lawsuit. Rather he was to be a conspicuous example by respondent to show in the words of Mr. Rath, "it was foolish for me to try to sue them or anything, because I didn't have the money" (Tr. 480).

As to damages caused by the inability to set prices of his own judgment while at the station, it would be sufficient here to point out that the ouster proved the inability to freely set prices without the loss of the business.

It is respectfully submitted that a decision which denies the small dealer and trader the protection of

the Sherman Act against coercive conduct interfering with his ability to sell in accordance with his own judgment, should not be allowed to prevail.

Dated, San Francisco, California,
March 6, 1963.

Respectfully submitted,

MAXWELL KEITH,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD S. SIMPSON, *Appellant*, vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee*.	No. 17,308 OPINION Jan. 2, 1963

Appeal from the United States District Court for the Northern District of California Southern Division

Before: JERTBERG, and DUNIWAY, Circuit Judges, and JAMES M. CARTER, District Judge

CARTER, James M., District Judge

This private antitrust case for damages was decided on motion for summary judgment in favor of appellee, Union Oil Company of California, hereinafter called Union, and against appellant, hereinafter called Simpson. Generally, it raises the issues of (1) interstate commerce; (2) violation of the antitrust laws and liability of Union, and (3) actionable damage suffered by the plaintiff.

We assume for the purpose of this decision, but expressly refrain from deciding, that there were triable issues of price fixing,[1] exclusive dealing,[2] the effect of the McGuire Act,[3] the effect of a

[1]See: *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150.

[2]See: Sec. 3, Clayton Act, 15 U.S.C. Sec. 14;
United States v. Standard Oil Co., (D.C.So.Calif. 1948) 78 F.Supp. 850; affirmed *Standard Oil Co. of Calif. v. United States*, (1949) 337 U.S. 293;
United States v. Richfield Oil Co., (D.C.So.Calif. 1951) 99 F.Supp. 280; affirmed per curiam, *Richfield Oil Co. v. United States*, (1952) 343 U.S. 922.

[3]66 Stat. 632, 15 U.S. Code, Sec. 45(2), amendment of July 14, 1952 to Section 5(a) of the Federal Trade Commission Act.

prior consent decree of June 1959, whether the consignment program was a device or facade,[4] and inter-state commerce.[5] We refrain from deciding these questions as a matter of law or fact because it appears clearly on the record that Simpson suffered no actionable damage.

The Undisputed Facts

The following statement of facts which are apparently not in dispute, are taken largely from the statement of the case in the brief of Union.

Union is a producer, refiner and marketer of gasoline. It owns a long term lease on a parcel of land in Fresno, California, improved with a gasoline service station. On May 23, 1956, by written lease, Simpson subleased the station from Union for a term of one year, subject to termination by Simpson (but not by Union) on 30 days notice. In 1957 Union gave Simpson a new one year lease, ending by its express provisions on May 22, 1958. Concurrently with the first lease, Simpson and Union executed a written Retail Dealer Consignment Agreement, terminable by either party at the end of any year and ceasing, under paragraph Eighth, upon any termination of Simpson's right to occupy the station.

In April 1958, Union notified Simpson that it was terminating the consignment agreement at the end of its year and would not offer him a further lease.

See: *United States v. McKesson & Robbins, Inc.*, (1956) 351 U.S. 305, 310;
Business and Professions Code (Calif.) Sections 16,905, 17,040 and 17,045.

[4]See: *Appalachian Coals Inc. v. United States*, (1933) 288 U.S. 344, 360;
United States v. Yellow Cab Co., (1947) 332 U.S. 218, 227;
Kiefer-Stewart Co. v. Seagram & Sons Inc., (1951) 340 U.S. 211, 215;
Timken Roller Bearing Co. v. United States, (1951) 341 U.S. 593, 598;
United States v. Masonite Corp., (1942) 316 U.S. 265, 278;
United States v. Richfield Oil Corp., (D.C.So.Cal. 1951) 99 F.Supp. 280, 289;
United States v. Standard Oil Co., (D.C.So.Calif. 1948) 78 F.Supp. 850, 859.

[5]The question of interstate commerce was merely touched on at pretrial and was not passed upon by the trial court.

May 21, 1958, the day before the end of his term, Simpson brought this action to enjoin Union from taking possession of its property and from leasing the station to anyone else. On June 3, 1958, the court denied the requested relief. The trial court filed an opinion, *Simpson v. Union Oil Company*, 162 F.Supp. 746, holding that both the lease and the consignment agreement had expired, and that the court could not compel the making of a new lease.

Union then sued Simpson in the state court in Fresno for unlawful detainer of the property and obtained judgment, adjudicating that at all times after May 22, 1958, Union was entitled to possession of the service station. Simpson thereupon surrendered possession.

Union moved to dismiss the federal action. The motion was granted, but leave was given Simpson to amend. An amended complaint was filed seeking damages in lieu of equitable relief. After certain pretrial proceedings, Union moved for summary judgment.

Thereafter Simpson himself moved for summary judgment on the issue of liability. Simpson's motion was denied, and Union's was granted. The trial judge filed a memorandum, reported in 1961 Trade Cases, Para. 69,936 p. 77,693.

Union's consignment method.

Prior to 1955, Union's merchandising method was by sale to retailers for resale by them. Union put its "consignment" program into effect in 1955, as a permanent measure. New dealers were taken on only as "consignees", and as rapidly as possible former dealers were converted to "consignees" or their leases not renewed. By the time Simpson sought to be a lessee, "consignment" was the only way in which Union would deal with new lessees.

Under this "consignment" method of marketing, Union purportedly remained the owner of the gasoline, and the "consignee" as its purported agent, sold Union's gasoline. The dealer received a guaranteed commission from Union. Since Union purportedly owned the gasoline and the dealer was merely its purported agent

to sell, Union determined the price at which the gasoline was to be sold.

The written consignment agreement provided that Union would deliver to Simpson such quantities of its branded gasolines as the parties *might from time to time mutually agree;* that title to all gasoline delivered would remain in Union until sold by Simpson. Simpson agreed that he would sell "Consignor's gasoline" at prices authorized by it and Union agreed that it would pay Simpson a commission, computed pursuant to a stated formula.

Simpson had been a salaried employee for Union for about eight years, his last position being that of retail representative in the Santa Maria district. He was familiar with the "consignment" agreement and method; he was told by Union he might lease an available Union station and decided upon a station in Fresno, California. In May of 1956, he secured his first lease, and by renewal his lease ran to May 23, 1958. Apparently until March of 1958 he complied with the terms of the "consignment" agreement and fixed prices accordingly.

On or about March 1958, competitors lowered the price of regular gasoline from 34.9 to 27.9. Union did not permit him to lower his price to 27.9 but insisted he maintain it at 29.9, 2 cents above competition.

Simpson then proceeded to set his own prices for gasoline and from March 1958 to the end of the lease fixed prices without reference to demands or suggestions of Union. He was told that if he did not comply with Union's suggested prices, his lease would not be renewed. Union stipulated in the trial court that when his lease expired it was not renewed because of his violation of the "consignment" agreement and that it was Union's purpose to lease its stations only to "consignees".

The Amended Complaint

Simpson's amended complaint charged Union with effectuating contracts which unreasonably restrain trade and commerce; and with the intent and an attempt to monopolize the sale of gasoline in violation of the Anti-trust laws. The amended complaint charged price fixing, exclusive dealing and coercion in forcing the consignment program on independent service station operators.

Plaintiff's Claimed Damage

Simpson claimed damage in the sum of $1000 for his inability to establish his own retailing prices during the period from May 1955 to March 1958, and claimed damages in the sum of $150,000 alleging he was "unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interest as lessee to a successor of his own choosing, and was prevented from selling his 'good will' and was prevented from obtaining the fair market value of his business".

THE STATE OF THE RECORD

The record is not an easy one to read. No written pretrial stipulation of facts was entered into nor was any formal pretrial order made. The trial judge however, filed a memorandum which was helpful.

The Record contains transcripts of proceedings at a pretrial conference on April 30, 1959; a further pretrial conference on May 21, 1959; transcript of proceedings on Union's motion for summary judgment on February 11, 1960; transcript of proceedings on Simpson's motion for pretrial summary judgment on September 16, 1960.

At the pretrial conference on May 21, 1959, the Court suggested that Simpson's counsel submit a statement of the case in factual detail. On June 5, 1959, Simpson filed a "Pretrial Statement for Pretrial Ruling" and an affidavit by Keith, attorney for Simpson, setting forth a series of documents. This statement was before the court on the hearings of the motions on February 11, 1960 and September 19, 1960.

The statement contained the charge that there was an exclusive dealing arrangement, and that lessees were in effect required to buy their gasoline supplies exclusively from the defendant. The statement also charged that the purpose of the defendant in instituting the consignment program, was to control the prices at which independent service station dealers could sell their gasoline. However, there was no concession by Union that the pretrial statement was correct.

At these proceedings before the trial court there was considerable discussion about issues and to say the least, plaintiff's con-

tentions vacillated. Defendant's counsel was pursuing the customary practice in antitrust cases of segmenting the case into parts as small and precise as possible and then attempting to demonstrate there was nothing of merit in each particular part or segment.

The result of all this was to create a most unsatisfactory record in which plaintiff on one date may have indicated he was not seriously pressing a particular contention and at a later date we find the contention being made. Accordingly in the briefs, Union seeks to pin issues down, based upon some statement made in the transcript and Simpson in the briefs, attempts to argue the full extent of his claim unbound by statements made during the proceedings.

If agreement as to facts or issues are reached in the discussions of the pretrial conference, the better practice is to reduce them to writing in the form of a pretrial stipulation and order. As the record now stands, it is almost impossible to determine what agreements, if any, were reached at pretrial.

Damages

We proceed to the question of damages which is dispositive of this case.

It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be present only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust laws, but show also the impact of the violations upon him and damage to him resulting from the violations of the antitrust laws.

If Simpson, assuming, solely for this purpose, the illegality of the consignment program, suffered no actionable damage, the judgment for Union must be affirmed.

Plaintiff has predicated his case on two items of damage—

(1) failure to secure a renewal of his lease, with $150,000 damage alleged, and

(2) "plaintiff was unable to fix the prices of his gasoline during the period from May 1955 to March 1958, to his injury and damage in the amount of $1000".

Failure to Secure Renewal of Lease.

As to the first item of damage, the facts are not in dispute. Assuming for argument only that the consignment program is illegal, courts may not fashion a new lease for Simpson. Right or wrong, as far as Union's activities are concerned, Simpson's tenure ended on May 22, 1958.

We agree with Simpson that a cause of action in a private antitrust suit for treble damages is a tort action, *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7 Cir. 1943) 138 F.2d 967 at 970; cert. den. 321 U.S. 792, and is not founded on a contract, and that the fact the contract was terminated, the lease ended and all rights of the plaintiff as lessee in the land came to an end in May 1958, is not an answer to the problem.

Simpson alleges that he was "compelled to accept the one year lease" and "compelled to accept the consignment agreement". His first lease began May 23, 1956, and was renewed for one year to expire on May 22, 1958. He alleges that prior to May of 1955, Union had used a policing method to carry out price fixing. He charges in May 1955 Union created the consignment agreement. He alleges this contract was "forced" on the independent stations by Union.

In determining whether Simpson suffered or could have suffered any damage, it would appear a distinction should be made between the individual, such as Simpson who was entering his first lease with Union in May of 1956 and other individuals who in May of 1956 already were lessees and had been for some time, i.e. already had status as lessees. *Midwest Theatres Co. v. Co-Operative Theatres*, (D.C.E.Mich. 1941) 43 F. Supp. 216 at 223-24.

Simpson knew that by obtaining the lease he would also have to sign the consignment agreement. He had not previously been a lessee. He had freedom of choice to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.

Simpson is therefore not in the position of lessees who had been operating stations under leasesfrom Union and who may or may not have been forced or compelled to sign a consignment agreement as a condition for renewal of their lease. This latter class of individuals had already made an investment in supplies, equipment for their leased stations; had in most cases built up patronage and good will; on the facts in the record might have reasonably anticipated their lease would be renewed from year to year if they performed an adequate job in the service station.

Had Simpson been a member of this class, there might be some merit to his allegations of force and compulsion and his proposed proof of coercion in the acceptance of a renewal lease tied in with the consignment selling program. We do not pass on the question as to these lessees. But Simpson was coming into the leasing business fresh. He had had no former lease agreement.

The law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.

The Restatement on Torts, Sec. 892, states,

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct".

Courts of law do not award damages to the plaintiff who through his own action has brought the alleged injury upon himself.

It thus appears that any damage occurring to Simpson was the result of his own free and deliberate choice and he could not

deliberately and knowingly enter into contractual obligations and then and thereafter contend he was injured by the results of his own acts.

We pass no opinion whether, as a factual matter, dealers in the second category here referred to, i.e. with stations, have been compelled, forced or coerced in their dealings with Union; or if this has happened, what are their rights if any. This decision may await another day with a trier of fact to decide that question.

Inability to Set Prices

What we have said as to Simpson's first specification of damage, also applies to his claim of inability to fix prices.

In addition it should be noted that Simpson alleges he was "unable" to fix the price of gasoline from May 1956 to March 1958. The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958. True he did this at the hazard of failing to secure a renewal. The hazard actually eventuated.

The immediate assumption one makes is that he could have pursued this course of action earlier. His action in March 1958 demonstrates he was not "unable" to fix prices on gasoline.

Simpson was apparently content to let the situation rock along until March 1958. Then he acted.

What he could have earned had he fixed prices on the gasoline from May 1956 to March 1958 is conjectural. Damage in an anti-trust case need not be shown to a mathematical certainty. *Karseal v. Richfield*, (9 Cir. 1959) 271 F.2d 709. Possibly proof could have been made. But when his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails.

Conclusion

We pass no opinion on the legality of the consignment program.[6] The issue of damages determines this case.

For the reasons stated, the judgment is affirmed.

(Endorsed) Opinion Filed Jan. 2, 1963.

Frank H. Schmid, Clerk.

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[6]Two consignment cases are pending before the F.T.C.

In *F.T.C. v. Sun Oil Co.*, (1962) Trade Cases, Para. 15,909, an examiner found consignment agreements between Sun and its retail dealers were invalid. The examiner found that the agreements were not primarily to aid the dealers financially as contended, but were entered into "to enable Sun to post uniform lower retail prices throughout the area, increase its share of the market, and attempt to reduce the differential between Sun and the private-brand operators to one cent a gallon". Therefore, there was not a bona fide agency.

As a result of unrealistic tank-wagon prices and leasing arrangements, the examiner found that Sun had economically coerced the dealers into accepting the contracts against their will, although an ostensible choice had been given. The element of coercion was cited as the distinguishing factor between the present case and *United States v. General Electric Co.*, (1926) 272 U.S. 476.

In *Atlantic Refining Co. v. F.T.C.*, (1962) Trade Cases, Para. 15,786 an examiner found a consignment agreement between Atlantic and its wholesalers, used in meeting a competitive situation, was valid as following the principles of *United States v. General Electric Co.*, (1926) 272 U.S. 476.

Insufficient evidence of coercion was found to destroy the validity of the agency agreement.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 17,308

Richard S. Simpson,
Appellant,

vs.

Union Oil Company of California,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellant.

It is further ordered and adjudged that the appellee recover against the appellant for its costs herein and have execution therefor.

Filed and entered January 2, 1963.

Appendix C

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U. S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the Court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment

or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 907

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. i-x) is reported 311 F.2d 764. The District Court's opinion is reported only in 1961 Trade Cases § 69,936. An earlier opinion of the District Court denying an interlocutory injunction is reported 162 F.Supp. 746.

STATEMENT OF THE CASE

It is necessary to state the case, for the petition fails to do so accurately or clearly.

Respondent is a producer, refiner and marketer of gasoline and either holds under lease or owns realty on which it has erected service stations. Before 1955 it merchandised gasoline by selling to retailers for resale by them. In 1955 it discontinued this method of merchandising and adopted another, that of selling its gasoline directly to the motoring public through its own service stations by consignee agents to whom it paid a commission with a guaranteed minimum.

As a salaried employee of respondent, petitioner had been one of its dealer representatives and thus knew that it would not sell gasoline to dealers and that it would not lease its service station properties except to consignees. Ceasing to be an employee, desiring to become an operator of one of respondent's service stations, and knowing the terms upon which alone it would deal with him, he asked for and in May 1956 chose to accept a lease for a term of one year (terminable by him but not it any time on 30 days' notice) and to become a consignee under an agreement terminable by either party at the end of any year but in any event on expiration of the lease. In May 1957 respondent gave him a new lease for another year expiring by its terms May 22, 1958.

Being informed in 1958 that respondent would not give him yet another lease, he brought this suit the day before the end of his term to enjoin it from taking possession of its property. June 3, 1958 the District Court denied the requested relief (R. 42), *Simpson v. Union Oil Co.*, 162 F.Supp. 746, on the ground that the lease and consignment agreement had expired and that it could not compel the making of a new lease.

Thereupon respondent sued petitioner in a State court for unlawful detainer of its property and obtained judgment that at all times after May 22, 1958 it was entitled to possession (R. 105, 106). Petitioner then surrendered possession in compliance with that judgment and promptly obtained and began to operate a service station of General Petroleum Co. (Socony-Mobil) where

he and a partner have each averaged more profit than petitioner had done at the respondent's station (R. 86, 320-3).

The present suit thus becoming moot, petitioner amended his complaint to seek damages in lieu of equitable relief (R. 46). On respondent's motion for summary judgment (R. 59) the District Court (by another judge) stated that "plaintiff's case is extremely thin" but denied the motion without prejudice in order to permit petitioner the opportunity to "throw more light upon the alleged claim" by further discovery (R. 87, 88).

Following approved practice,* extensive discovery and pre-trial then ensued, before a third District Judge. To eliminate possible issues of fact respondent stipulated to facts claimed by petitioner. As the court below observed, "to say the least, plaintiff's contentions vacillated" (Pet. App. v, vi), but, nevertheless, in the end petitioner told the District Court that he proffered only two issues as respects liability: (1) Whether the consignment agreement was unlawful on its face, and this he conceded involved no issue of fact, and (2) whether the consignment agreement was "coerced" on unwilling lessees (R. 378). The following colloquy then occurred (R. 379-380):

> "MR. LASKY [Respondent's counsel]: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products * * * the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the

*As exemplified in the statement of Chief Judge Murrah in *New Home Appliance Center v. Thompson*, 250 F.2d 881, 883, 884 (10 Cir. 1957), that "issues * * * are to be ascertained and articulated by the free use of controlled pre-trial discovery under the guiding hand of the judge who has the responsibility for the trial of the case".

facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

"THE COURT: That is precisely what you mean by the word 'compel'?

"MR. KEITH [Petitioner's counsel]: *This statement is correct.*

"THE COURT: And to the extent that that may be regarded as coercion, you will stipulate to that, is that right, Mr. Lasky?

"MR. LASKY: Why, yes. I don't stipulate it is coercion, but I say these are the facts.

"THE COURT: If that constitutes coercion—

"MR. LASKY: Then we coerced him."

With this concession by petitioner of what he meant by "coercion" (see also R. 423-425) and this stipulation by respondent of the facts involved in the contention, petitioner conceded that the issue of "coercion" was also a pure issue of law (R. 379-380).

In the end, in response to the court's request to petitioner for a statement whether there were any issues of fact to try, petitioner conceded that there were none except as to the amount of damages if damages were legally recoverable (R. 412-435, particularly 427-428). As summarized by the District Court (R. 347), "Extensive pre-trial proceedings before this court have eliminated all the factual disputes and defendant has stipulated to certain disputed specific allegations of fact to facilitate disposition of this case on reciprocal motions for summary judgment."

The case does not involve conspiracy. Petitioner early conceded (R. 369) "This is not a conspiracy case. This is a case of activities of a single defendant", a concession later repeated (R. 395), "the complaint does not charge a conspiracy". No more did it involve monopolization. Petitioner early conceded that the issue of monopoly "is out of the case" (R. 397). Thereafter, in his "Pre-trial Statement for Pre-trial Ruling" (R. 199), superseding his amended complaint (R. 399-406), there was no mention or charge of mo-

nopoly or monopolization, nor was there at the later pre-trial conference pin-pointing the issues (R. 407-435).*

Cross motions for summary judgment were made and that of respondent was granted. The District Court held that use by the owner of merchandise of a consignee-agent to sell its property at the prices directed by the principal did not violate the Sherman Act. It also held that there were no actionable damages. On appeal the court below did not decide any question of legality under the antitrust laws of respondent's conduct, "because it appears clearly on the record that Simpson suffered no actionable damage" (Pet. App. ii). On that ground it affirmed.

While there are references in the petition to "exclusive dealing", petitioner claimed no damages from any alleged exclusive dealing.† As stated both in the opinion of the court below (Pet. App. v) and in the petition itself (p. 7) he claimed but two types of damage, (a) $150,000 because he was "unable to obtain a lease from the defendant for a reasonable period of time", this latter

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*Petitioner could do no less than drop reference to monopolization. As noted in *United States v. Standard Oil Company of California*, et al, 1958 Trade Cas., para. 69,212 at p. 74,760, there were approximately 36,000 service stations on the West Coast; about 21,000 were either owned by dealers themselves, or leased by them from persons other than any of the seven defendants in that case, of which respondent was but one. Respondent's stations sold only about 11.5% of the total gasoline in California (R. 38). There were at least 246 service stations in Fresno, California (the location of the station leased to petitioner) of which only 26 were selling respondent's gasoline, all in competition with stations selling the products of the various companies named above and numerous other marketers (R. 15-17, 113). Courts judicially know that this competitive situation prevails throughout California and that there is a "rather extensive list of great corporations engaged in the manufacture and sale of petroleum products". *Paraco, Inc. v. Dept. of Agriculture*, 118 C.A. 2d 348, 353, 257 P.2d 981 (1953). This Court has noted that even Standard Oil Company of California does not have a dominant position. *Standard Oil Co. v. United States*, 337 U.S. 293, 302 (1949).

†There was no requirement of exclusive dealing. Petitioner admitted at pre-trial that he would rest the claim on whatever answer he obtained to a certain interrogatory (R. 432, 434) and the answer did not show any such requirement (R. 336, 434).

being variously phrased, and (b) $1,000 for alleged inability to establish his own retail prices from May 1956 to March 1958. He conceded that he did establish his own prices from March to May 22, 1958 (Pet. App. ix).

QUESTIONS PRESENTED

The questions stated in the petition (pp. 2, 3) are not involved in the decision below. The true questions are these:

1. Absent a conspiracy, can a person demand that the owner of real property lease it to him on terms to be fixed by court or jury or pay him damages, on the ground that the only terms on which the owner is willing to lease would be, arguendo, incompatible with the antitrust law.

2. Can one party to an agreement recover from the other party damages said to flow from his own voluntary performance of the agreement on the ground that it violates the antitrust law?

The use of consignee-agents to sell gasoline was in accord with California Civil Code §§ 2026 and 2027* and has been held not to violate California's antitrust law, *Shasta Douglas Oil Co. v. Work*, 212 A.C.A. 640, 28 Cal. Reptr. 190 (Feb. 1963, hearing by Cal. Supreme Court denied, April 3, 1963). But no issue of legality of respondent's conduct is presented by the decision of the court below, for it did not reach any such issue.

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*Cal. Civ. Code § 2026, adopted in 1872, provides that

"A factor is an *agent* who, in the pursuit of an independent calling, is employed by another to sell property *for him*, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

Section 2027 provides:

"*A factor must obey the instructions of his principal* to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property *consigned* to him * * *."

Included in the "instructions of his principal" that a consignee must obey are those respecting the price at which the owner's goods are to be sold. *Bare v. Richman & Samuels, Inc.*, 60 C.A. 2d 413, 140 P.2d 895 (1943).

ARGUMENT

1. *If in 1956, before petitioner had ever become a lessee or consignee, he had declined to accept a consignment arrangement, certainly he could not have compelled respondent to lease its property to him without a consignment agreement, or pay him damages, on a theory that consignment was illegal.* The fact that he did enter into the consignment agreement for a space of time did not enlarge his rights and entitle him to still further leases on other and different terms. What petitioner seeks is more than a declaration that his consignment contract, dead and past since 1958, was illegal. Divorced from actionable damages that is a question that only the Attorney General could raise.

Stripped of verbiage, petitioner's grievance is that he wanted to do business with respondent but it refused to do business with him on his terms. He wished to occupy its real property and sell its gasoline but on his own terms. Respondent was not selling gasoline to retailers for resale. The only basis on which it cared to merchandise was to sell its gasoline directly to the consumer by the agency of consignees. It so informed him, and he accepted the terms. Thereafter he became dissatisfied with being a consignee. While at liberty to terminate the relationship at will, he chose not to do so. Sometimes he complied with his agreement, sometimes not. When the lease expired in May 1958 respondent declined to give him another. At that moment he not only ceased to be a consignee but ceased to have any legal interest whatever in its property and became a simple stranger to it. The state court judgment in the unlawful detainer action so adjudicated and is conclusive that under California law he had no further right to possession, tenure or estate.

The essence of what petitioner asked the courts to do is quickly evident. He first asked that the expired consignment agreement be held to have been illegal. The court below assumed, but did not decide, that it was. Petitioner next asked the courts to write a

new agreement between him and respondent, (a) whereby he is given a further tenure in respondent's property beginning May 1958 of a duration thought by him or a jury to be "reasonable" (and his claim of $150,000 damages was predicated on the assumption of a 15-year term (R. 313-314)), and (b) whereby respondent is held bound to sell gasoline to him for the same period after the expiration of the old contract, although it had not sold to him before, at a price to be fixed by the court. By the device of charging an antitrust violation, petitioner first sought to have a federal court, by injunction, give him an estate in respondent's California real property to which he had no right under California law. That relief having been denied, he sought damages for breach of a contract which has never existed but which the court was asked to create for him, doing so *sub nom.* a tort recovery.

The essential question is whether, despite admitted absence of any conspiratorial refusal, federal law imposed on respondent a duty to do what state law did not require, viz., to lease its property to petitioner for a further term after May 22, 1958, because the consignment agreement which expired on that day violated the antitrust laws (an assumption made *arguendo*).

There is a large and undeviating body of law that one who is in the business of selling may unilaterally discontinue selling to another for any reason whatever. Even if petitioner had owned his own place of business, had been buying gasoline from respondent, and respondent had then unilaterally refused to sell him further, whatever its reason, that law would deny him recovery of damages. So recently as *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960) this Court reaffirmed that a manufacturer may legally refuse to have business relations with one who fails to resell at prices satisfactory to or suggested by the manufacturer. To the same effect, *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), affirmed on the opinion of the

District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957);* *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952); *Hudson Sales Corporation v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821 (1954)†; *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959)‡; *Alexander v. Texas Company*, 165 F. Supp. 53 (W.D. La. 1958).

Petitioner's case is far weaker than this. Even were there erosion of the settled body of law that one may unilaterally discontinue selling to another for any reason, petitioner could not recover, for

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*There the District Court said (138 F. Supp. at 903), "Unless his contract so provides, a dealer once appointed has no tenure, no right to renewal of his contract."

†In the *Nelson* and *Waldrip* cases defendant was accused of refusing to deal further with plaintiff because of his refusal to accede to demands not to handle competitive merchandise. In the *Nelson* case the court said (p. 915):

> "There is nothing whatever in the [Clayton] Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself."

In the *Waldrip* case the court pointed out (p. 274):

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown * * * that the defendant had done so only because plaintiff had refused to give up in the future his other agencies * * *."

‡The court there said (p. 337):

> "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement."

here not only had respondent never sold to petitioner, but the question is whether one can be compelled to lease real property to another.

No case remotely supports petitioner. The numerous citations of cases of conspiracy are irrelevant. There is no conflict among the circuits to resolve. Petitioner incorrectly claims a conflict with *Ring v. Spina*, 148 F.2d 647 (2 Cir. 1945); *A. C. Becken Co. v. Gemex Corporation*, 272 F.2d 1 (7 Cir. 1959); and *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cer. den. 366 U.S. 963 (1961). There is no conflict, and the final *Ring* decision and the *Osborn* case fully support respondent. The cited opinion in *Ring v. Spina* was on an interlocutory appeal; the opinion on final decision, *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951, per Learned Hand, J.) denied damages to Ring on the ground that he had no interest in the property he claimed, for the reason that "the contract by which he obtained whatever interest he did obtain, was unlawful because it was part of the unlawful conspiracy" (p. 641):

> "The plaintiff repudiated it for that reason; but he was not free to repudiate it in part, keeping the right to 'produce,' and rejecting the conditions which the authors had imposed upon their promises, * * *. It follows that the judgment was right in holding that the plaintiff had no interest in the play, if we assume that the 'Agreement' was part of an illegal combination or conspiracy * * *." (p. 642)

So here: Petitioner's postulate is that the lease and consignment were illegal. But, if so, he had no right to some other interest in respondent's property. The rationale of the *Ring* decision is precisely that of the court below: one may not voluntarily put himself into a position or a relation, then claim it to be illegal and insist on acquiring rights from it.*

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*The opinion below (Pet. App. viii) quoted Restatement on Torts, Sec. 892 thus:

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not

In the *Osborn* case plaintiff had been a dealer-lessee of defendant and sought damages for cancellation of the lease on the ground that defendant engaged in an illegal tying arrangement. The District Court first held there was no tying agreement. Holding that there was, the Court of Appeals reversed (p. 835) and remanded but expressly refrained from holding that plaintiff could recover damages, noting (p. 840) that since defendant "had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable". On remand the District Court held that they were not. *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856 (D. Md. 1962).

2. Petitioner's second claim for damages—$1,000 for alleged inability to sell at prices as high as he wished during part of his two terms—was a palpable makeweight and afterthought. It was not advanced in the original complaint (R. 3-13). The original complaint was that respondent told him to charge more than he wished. When petitioner amended to claim damages, he about-faced to rest the claim for $1,000 on the contention that respondent had him keep his prices down (R. 465; R. 319-320, 324-329).

Assuming the consignment agreement to have been unlawful, petitioner could have simply refused to be bound by it, *Continental Wallpaper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), and petitioner had the power to resell the gasoline at whatever price he chose.* If, in truth, he charged less or more for gasoline than he preferred to do, his conduct was his own and any damages flowing therefrom flowed from his voluntary act.

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entitled to maintain an action of tort for harm resulting from such conduct."

Comment a to Sec. 892 adds:

"This is true although it is illegal for assent to be given and although either or both of the parties are liable criminally or liable to third persons because of the conduct consented to."

*Ignoring fair trading, an issue not decided below.

As the court below noted (Pet. App. ix), "The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958", which "demonstrates he was not 'unable' to fix prices on gasoline"; consequently, "when his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails." (Italics in original.)

What petitioner's legal assertion amounts to is this: Where A agrees with B to perform a certain line of conduct and from time to time does so, he can then recover treble damages from B on the theory that B could not have compelled him to perform the contract for illegality under the Sherman Act. No case has ever so held, and the contention is contrary to common sense. A party should decline to enter into an illegal contract, or, having entered it, may ignore it. He cannot, however, observe the contract and then recover damages for having done so. *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951). *Volenti non fit injuria* is an elementary doctrine expressed in California Civil Code § 3515 thus: "He who consents to an act is not wronged by it." Here the principle is stronger: He who does the act is not wronged by it.

The cases cited by petitioner are not in point. A plaintiff will not be denied recovery because of the unclean hands of having been or being engaged *in some other or collateral* illegal conduct, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), or, after one withdraws from a conspiracy, he will not be barred from recovering treble damages *thereafter* inflicted on him by the other conspirators by the continuance of the conspiracy; e.g., *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2 Cir. 1939). But what he himself does pursuant to the agreement said to be illegal, he cannot charge to the other. *Pennsylvania Water & P. Co. v. Consolidated G.E.L. & P. Co.*, 209 F.2d 131 (4 Cir. 1953), cer. den. 347 U.S. 960 (1954).

Petitioner exercised his volition to charge the prices he did charge. If he elected to adhere to the consigned prices, he did so for what he thought was a greater advantage to himself, and the act was still his free act. *Philco Corp. v. Radio Corp. of America*, 186 F.Supp. 155, 162 (E.D. Pa. 1960); *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 493 (9 Cir. 1950). And during the last several months of his tenancy he determined that the advantage was the other way and proceeded to charge whatever he wished to charge, thus demonstrating his ability to do so.

CONCLUSION

The decision of the court below which petitioner asks this Court to review passed on no questions of legality under the antitrust laws. This is a case of a plaintiff's voluntary conduct and no damage. It is respectfully submitted that the petition should be denied.

Dated: San Francisco, California, April 6, 1963.

MOSES LASKY

Attorney for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPENING BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPENING BRIEF

I

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 311 F.2d 764 and appears at R. 564-573.

The opinion of the District Court in entering summary judgment against the petitioner is reported at 1961 Trade Cases, § 69,936 and appears at R. 347-360.

The opinion of the District Court in denying petitioner's application for an injunction upon the original complaint, subsequently amended, is reported at 162 F.Supp. 746 and appears at R. 42-44.

II

JUDGMENTS BELOW AND JURISDICTION

This was an antitrust action which was filed in the Northern District of California, Southern Division.

The District Court entered a judgment against petitioner in summary judgment (R. 360-361). Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment on January 2, 1963 (R. 574). This Honorable Court granted petitioner's petition for a Writ of Certiorari on April 29, 1963 (R. 575).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

III

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C., Sec. 15; Section 16 of the Clayton Act, 15 U.S.C., Sec. 26. These are printed and attached hereto as Appendix A. Federal Rules of Civil Procedure, Rule 56, is also attached hereto as Appendix B.

IV

QUESTIONS PRESENTED

1. Whether an ousted independent service station dealer has a cause of action against his lessor and supplier under Section 4 of the Clayton Act for damages resulting from its refusal to renew a one year lease because of the dealer's disobedience to price control orders made by the lessor and supplier pursuant to its scheme and plan to fix and control the retail price of gasoline as to 3,000 dealers located in 8 western states by means of a so-called "retail dealer consignment agreement" plan?

2. Whether an independent service station dealer whose gasoline prices were fixed by his lessor and supplier has a cause of action under Section 4 of the Clayton Act against it for damages resulting from the service station dealer's coerced adherence to the supplier's price fixing directions?

3. Whether major gasoline suppliers are liable under the antitrust laws for using a one year lease as a weapon to restrain the independent dealers' ability to sell at prices in accordance with their own judgment to those injured by the weapon or whether the federal courts are allowed to immunize them from liability on the ground of the assumed dealers' consent to be victims of such weapon?

4. Whether petitioner was erroneously deprived of a trial by jury in the light of this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Poller v. Columbia Broadcasting System, Inc.*,

368 U.S. 464 (1962); *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)?

5. Is not respondent's consignment method of fixing prices of gasoline sold by some 3,000 retail dealers, as enforced and policed by respondent, a per se violation of Sections 1 and 2 of the Sherman Act?

6. Is not respondent's consignment method of fixing resale prices of gasoline in violation of the Sherman Act because it fixes retail prices of dealers after the risks of title have passed to them?

V

STATEMENT OF THE CASE

A. Nature of the Case.

1. The Pleadings.

Petitioner alleged in his amended complaint (R. 46-59)[1] that the Union Oil Company of California (hereinafter referred to as Union) was in violation of the Sections 1 and 2 of the Sherman Act (R. 50) and pursuant to such violation injured the petitioner. Petitioner alleged that the respondent violated the prohibitions of the Sherman Act in promulgating and enforcing a "Retail Dealer Consignment Agreement" which allows respondent to directly fix the retail prices that thousands of otherwise independent service station operators can charge the public (R. 51). It was further alleged that respondent violated the

[1] An original complaint for injunctive relief was filed, R. 3-13, under 15 U.S.C. § 26. It sought an injunction to require Union not to lease the service station involved to anyone but the petitioner.

Sherman Act in requiring lessees of its stations to purchase all their gasoline and oil products from Union (R. 51, 52).

It was alleged that the "Retail Dealer Consignment Agreement" was forced on independent service station lessees. Existing lessees were forced to sign said retail dealer consignment agreements on fear of losing their leases (R. 51). New independent lessees were unable to obtain leases from Union without submitting to the signing of the consignment agreement (R. 51).

It was alleged that Union had established a policing system to make certain that the dealers were following the prices set by Union (R. 52). It was alleged that Union issued only one year leases and refused to renew leases for additional periods unless the lessee has complied with the requirements and conditions established by Union (R. 51, 52). It was further alleged that Union limited the ability of the lessees to operate profitably, and preventing lessees from obtaining goodwill or the fair market values of their business should they desire to sell the business (R. 52). The complaint alleged that Union controls the ability of independent lessees to operate profitably by freely selling its gasoline to companies who operate large "off-brand" stations. These companies set prices well below the prices established by Union, which was known to Union, but Union prevented the dealers from meeting this competition (R. 52-53).

The complaint detailed the facts with respect to petitioner's injury (R. 54-57). Petitioner obtained a one-year lease from respondent in May, 1956 (erratum).

He was required to sign the retail dealer consignment agreement in order to obtain the lease. (This agreement is printed at R. 95-102. The leases of petitioner are printed at R. 19-27; 28-36). The complaint specifically alleged the conditioning of the retail dealer consignment agreement to the lease at R. 55:

> "21. As a condition to the above leases defendant Union Oil Company required that plaintiff sign the said Retail Dealer Consignment Agreement, attached hereto as Exhibit 'A.' Plaintiff protested the signing of said agreement, but was informed, in effect, that he could not obtain a lease without signing said consignment agreement."

A second lease was signed in April, 1957 (R. 55).

In March, 1958, the three competitive service stations close to petitioner's, Standard, Tidewater-Associated, and Richfield, lowered their prices of regular gasoline from 34.9¢ to 27.9¢ (R. 55). In order to meet this competition, it was alleged, plaintiff after requesting authorization from respondent which was refused, lowered his price to 27.9¢. The consignment price for regular gasoline had been set by Union at 29.9¢ (R. 56). It was alleged that approximately a week later the Fresno Division Sales Manager came to petitioner's service station and ordered him to raise his price up to 29.9¢ (R. 56). The complaint alleged that he ". . . informed plaintiff that he would do everything in his power to cause plaintiff to conform to said prices. He implied by words and action that plaintiff's lease would not be renewed unless he raised

his prices to 29.9¢" (R. 56). Plaintiff refused to abide by the commands of the Union agent and persisted in setting his own retail prices (R. 56). On or about April 21, 1958, plaintiff was notified that the one-year lease would not be renewed (R. 56).

The complaint seeks monetary damages for loss of petitioner's business in the sum of $150,000.00, and for losses suffered by reason of the fixing of his prices while a lessee from May, 1956 to March, 1958, in the sum of $1,000.00 (R. 57).

On May 21, 1958, the day before his lease was to expire, the petitioner filed an action for injunctive relief seeking to compel Union not to lease the property to anyone other than plaintiff (R. 13). A temporary restraining order was granted (R. 547), but on June 3, 1958, the Court terminated the order and declined to issue a preliminary injunction (R. 42-44). The petitioner voluntarily vacated the service station site as of June 5, 1958 (R. 57). An order was entered upon stipulation, dismissing the original complaint and allowing the filing of an amended complaint (R. 44-45). The amended complaint was thereafter filed on July 3, 1958.

Before answer, the respondent made a motion to dismiss the amended complaint and for summary judgment (R. 59-61). The motion was denied without prejudice (R. 87-88). An answer was thereafter filed (R. 88-106).

The answer admitted that Union was a corporation doing business in the States of California, Arizona,

Oregon, Washington, Montana, Utah, Idaho, Nevada, Alaska and in the territory of Hawaii (R. 89); that it has assets in excess of three hundred million dollars and that it drills for, produces and imports crude oil (Id). It admits that it operates petroleum pipelines in the States of California and Montana and that it leases ships designed to transport crude oil and products along the seacoast of the West Coast of the United States. Union Oil admitted that it operates at least four refineries in the United States, one at Wilmington, California, one at Cutbank, Montana, one at Edmonds, Washington, and one at Oleum, California (R. 89-90). Union admitted that it is a wholesale distributor of petroleum products and owns or operates 400 bulk plant stations in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, and Nevada (R. 90). It sells products to wholesalers and retailers located in said states (R. 90). It owns and operates a number of gasoline transports in the eight western states which pick up petroleum products at transport terminals and deliver the petroleum products of defendant to retail outlets (R. 90).

The answer further admitted that it acquired possessory interests in service station sites in eight western states and leases such service station sites to others and "admits that most of said service station sites are leased or subleased by defendant to independent operators." (R. 91).

With respect to the "Retail Dealer Consignment Agreement" the answer refused to admit that it directly controlled retail prices, but it did attach a copy

of the agreement between petitioner and respondent to the answer (R. 91, 95-102).

With respect to the allegations concerning the petitioner's attempt to meet prices, establish his own market prices, and his consequent ouster, the respondent admitted that the authorized price to petitioner was 29.9¢ between February 28, 1958, and March 12, 1958 (R. 92). It admitted that petitioner sold regular gasoline at 27.9¢ (R. 92-93). It denied that petitioner had requested authorization to meet the price of 27.9¢ (R. 93). It admitted, however, that petitioner was ordered to follow Union's price. The answer stated, R. 93:

> "17. Answering paragraph 24, defendant admits that approximately one week later, Mr. W. S. Christopher, Division Sales Manager, Fresno, called on plaintiff and told him that he was violating the consignment agreement and informed plaintiff that he would do what he could to cause plaintiff to abide by the terms of the consignment agreement. Except as so admitted, defendant denies the averments of said paragraph 24."

The answer then admitted that petitioner persisted in setting his own prices at variance with respondent's authorized prices, and that thereafter the lease was not renewed (R. 93).

> "18. Answering paragraph 25, defendant alleges that following said conversation plaintiff refused to comply with his obligations under the consignment agreement existing between the parties and persisted in selling defendant's gasoline at prices at variance with those authorized by defendant

thereunder; admits that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant. Except as so admitted, defendant denies the averments of said paragraph 25."

The answer asserted the affirmative defense of a prior judgment of the Superior Court of the State of California in and for the County of Fresno which was claimed to have adjudicated respondent's right to possession of the service station after May 22, 1958 (R. 94). It also asserted the affirmative defense of pari delicto (R. 94).

2. Pretrial Proceedings.

The District Court ruled that petitioner's discovery should be allowed only after pretrial conferences were requested by the plaintiff (R. 106-108). Thereafter, petitioner, in compliance with this order, filed a motion for a pretrial conference, a statement of issues and agenda and a statement re damages (R. 179, 187-188-189, 190-198). Respondent filed its statement of issues (R. 181-187).

This first pretrial conference was held April 30, 1959 (R. 368-392). At this pretrial conference the District Court was of the view that the parties could stipulate to the basic facts and utilize the interlocutory appeal provisions of the federal rules in order to determine the lawfulness of the respondent's retail dealer consignment agreement program (R. 373, 377-378, 386, 389). The conference ended with the request of the court that basic facts should be stipulated and

that there be a certification of the issues based on the stipulated facts as to violation of the antitrust laws (R. 391). The stipulations and contentions of Union Oil at the pretrial conference were that it tied the retail dealer consignment agreement to the granting of the one year lease (R. 380, 387)[2] and that it had the right to refuse to renew leases of those who refused to abide by its authorized prices (R. 386-388).[3]

A second pretrial conference was held May 21, 1959 (R. 392-406). At this pretrial conference the parties were unable to agree to stipulations as to undisputed facts. The District Court, upon the contentions of respondent's counsel, that respondent could lawfully, under the Sherman Act, grant only one year leases and then refuse to renew the leases of all those who did not abide by authorized prices, was of the view that respondent was willing to concede the basic issues in the case (R. 395-396, 399). It was of the view that petitioner should file a pretrial statement for a pretrial ruling on the issue of violation of the antitrust laws (R. 399-400, 403-406).

Thereafter, counsel for petitioner filed a pretrial statement for a pretrial ruling (R. 199-210). Attached to this statement were letters sent by respondent's General Sales Manager, Dealer Sales, to the division officers explaining or giving instructions on the retail dealer consignment program (R. 210-298). The

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[2]Attached hereto as Appendix C are certain quotations from the pretrial proceedings before the Court. See Part II, pp. vii-ix. They are examined more specifically in section 3, below.

[3]Id.

plaintiff's pretrial statement did not waive trial by jury (R. 199).

The respondent was to move for a pretrial ruling on this statement, but it did not do so (R. 399, 406). Instead it noticed the deposition of the petitioner. Portions of the depositions appear in the printed record at R. 452-493; 300-321.

Following the deposition of petitioner, respondent again moved for summary judgment (R. 298). The motion was on all issues (Id.). At the arguments on motion (R. 407-435) heard on February 11, 1960, the District Court was again of the opinion that, based on the extensive stipulations of counsel for respondent, issues could be and should be decided by the Appellate Courts (R. 413, 426-427, 435). The Court was of the view that petitioner should file a motion for partial summary judgment on the issue of violation of the antitrust laws (R. 427). The respondent stipulated that the purpose of the retail dealer consignment agreement program, among other things, was to control prices; that it would issue one year leases and not renew leases to those who did not agree to be consignees; that no free choice was allowed the dealer; he either accepted the package deal or he would not obtain a lease (R. 409, 415-419, 429).[4]

Subsequent to the motion of defendant for summary judgment, petitioner then filed a motion for partial summary judgment on the issue of violation of the antitrust laws (R. 337-338). The motion expressly

[4]See Appendix C herein, Part II; pp. ix-x.

did not waive petitioner's right to trial by jury (R. 338). An extensive memorandum in support of the motion for partial summary judgment was filed by petitioner, and its table of contents appears at R. 339-343. Following the argument on the petitioner's motion (see R. 436-441), the District Court ruled in favor of the respondent on all issues and filed an opinion (R. 347-360). Judgment was then entered for respondent (R. 360-361). Petitioner entered objections to the entry of judgment (R. 361-366).

3. The Stipulations and Undisputed Facts in Summary Judgment As To Violations of the Antitrust Laws.

The record thus contains stipulations by respondent, admissions contained in policy letters or in papers filed by respondent as to the purposes, means used, and effect of its retail dealer consignment agreement scheme. Respondent agreed that it would not dispute the policy letters it submitted to petitioner during these pretrial proceedings (R. 427-428).

(a) Interstate Trade and Commerce:

In addition to the admissions contained in the respondent's answer, the record contains basic admissions as to operation of respondent's consignment agreement program in interstate trade and commerce:

1. The Union Oil Company holds primary possession to 2,003 service stations in the States of California, Washington, Oregon, Nevada, Arizona, Montana, Utah and Idaho. (Statement of Defendant Pursuant to Proceedings of January 20, 1960 (R. 332-337).)

2. The Union Oil Company has gasoline supply agreements with an additional 2,116 dealers who either own the outlets or lease them from third parties (id.).

3. The gallonage delivered to the lessee dealers in 1957 was approximately 427,000,000 gallons, and to non-lessees was 90,000,00 gallons (R. 334). The total dollar volume of sales of refined petroleum products in 1957 by respondent was $347,900,000 (R. 211).

4. Union Oil Company sold approximately 11.5% of all gasolines sold through service stations in the State of California (R. 38).

5. By 1957, out of the total of 2,003 service stations under possessory control by Union in the eight western states set forth above, 1,978 were retail dealer consignment stations. Out of the total of 2,116 non-lessee dealers, 1,327 were on retail price fixing consignment (R. 334).

6. Union sold as much as 250,000 gallons of unbranded gasoline in any six month period to 14 independent refineries and distributors (R. 335-336). Petitioner showed that many of these distributors operated retail outlets either directly or through lessees who attempted to retail gasoline at prices 2¢ below those set by Union (R. 493, 508; R. 525, 532; R. 539, 545).

7. Union operates, as company operated, 12 service stations in California (R. 333) and 2 in the State of Washington (R. 333).

8. Union operates a chain of off brand service stations in the State of California operating under the name of Westways (R. 446-449).

(b) The Retail Dealer Consignment Agreement Program.

(i) *Chronology*

Prior to 1955 Union did not have consignment agreements (R. 91, 343-345). On or about December, 1954, Union Oil decided to control the retail price of dealers, in certain localities, "when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level." (R. 223-234). The method to be used to accomplish this was the Retail Dealer Consignment Agreement (R. 223, 224-230).

Letter, 12/24/54, R. 223-224:

> "We attach draft of the Retail Dealer Consignment Agreement to be used when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level. This agreement temporarily suspends our normal buy and sell arrangements on gasoline, making the dealer our agent for the sale of our gasoline consigned to his storage. . . ."

Letter, 3/9/55, R. 231-232:

> "So there will be no misunderstanding, the following information is presented to supplement the information contained in our first letter: A change in our selling price is necessary because of our two new Gasolines whenever we decide to drop our fair trade price, appoint our dealers as consignment agents and nominate the price for which they are to sell our Gasoline. In all cases in the neighborhood or community where we elect

to do this, the selling price nominated by us for premium gasoline will be 3¢ over major competition in the community and regular gasoline will be 2¢ over regular competition.

Where we decide to put this program into effect, it should be done quickly; in other words, follow the competitor on the hour by the hour and when competitors move down, be flexible enough so that you can move right along with them.

The neighborhood or the community must in all cases include all stations in the community that has been set up as the geographic area that we have previously determined is the logical area of influence of a similar price.

The margin in the consignment agreement before rent will be 5 and 5½¢ and we believe the agreement is self-explanatory so that after we start the program and later the cut price situation cleans up and we would nominate a price equal to or above our former fair traded price, . . . the dealer's margin would advance to the same margin he normally made when we were fair trading . . ."

On or about March 10, 1955 it was decided not to make the retail dealer consignment a temporary arrangement, but to make it permanent. The instructions were:

"We attach copies of revised Retail Dealer Consignment Agreement to be used, as outlined in our letter of March 9, when the competitive price conditions in certain neighborhoods require a change in our retail selling price, then this plan

is adopted for a given trading area, which will comprise all of the area within a marketing station boundary (with the exception of those metropolitan areas which have been divided into economic trading zones), it will be offered to all dealers within the nominated area." (Letter 3/10/55, R. 233).

(ii) The One-Year Lease Policy

The Union Oil Company at all times herein since 1952 has issued only one year leases (R. 213-223).

The one year lease requires the lessee to pay rent to Union Oil Company and assume all the risks of the enterprise (R. 19-27). The lease of the respondent required petitioner to pay it rent fixed at 2¢ per gallon plus a small monthly charged or a fixed sum referred to as "fixed monthly rental" (R. 21). The lease required the lessee to keep the stations open for so many hours per day. In the case of petitioner, it was 16 hours (R. 23). Lessee is to: pay for any repair or damage under or within lessee's reasonable control (R. 23); pay all taxes on the products, property and improvements of lessee; pay all license fees, all excise taxes levied on the handling, storage, withdrawal, distribution, sale or delivery of products handled or sold by lessee; pay all water, gas, heat and electricity (R. 24). Lessee is to pay all compensation, insurance, unemployment insurance, old age benefits, annuities and retirement benefits as to his employees (R. 24-25). Lessee agrees to hold lessor harmless from personal liability and agrees to carry public liability insurance in amounts and with insurance satisfactory to lessor

(R. 26). A good faith deposit of $50.00 is required of the lessee (R. 26-27).

(iii) The Retail Dealer Consignment Agreement

The retail dealer consignment agreement is a gasoline products delivery agreement by which the dealer is to maintain the trademarks of Union on his pumps and other facilities through which gasolines are dispensed (R. 95). Respondent's counsel has stipulated that Union Oil Company will not do business with anyone who violates the terms of the agreement (R. 379-380; 401-402; 417-419). The dealer could not, under respondent's consignment agreement, repaint the whole station and dispense another company's gasolines at his station without ouster (Id., R. 434-435).

The retail dealer consignment agreement provides that consignor reserves title to the gasoline and consignee will "sell consignor's gasolines at prices from time to time specifically authorized by consignor in writing" (R. 95). The agreement provides as follows:

(a) The risks of operation, storage, loss, evaporation, taxes and handling charges are on the consignee (R. 95-98). The one exception is loss from a natural catastrophe (R. 97-98).

(b) Consignor agrees to pay the property tax on stored gasoline, if any (R. 100).

(c) Consignee must carry insurance to cover the operations of the station, including public liability

and personal property insurance. The costs of insurance as to the stored gasoline is on consignee. Paragraph 5 provides (R. 97):

> "He [consignee] will pay for all expenses, costs, licenses and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimbuse Consignor therefore in the event the same be paid by Consignor in the first instance. . . ." (insert added).

(d) Consignor purported to agree to pay a minimum commission to the dealer (R. 99-100). The record showed the respondent refused to guarantee the commission at all times herein. The record is undisputed as to the following facts (R. 427-428).

In February, 1958, respondent determined to do away with the guaranteed minimum commission (R. 285). Instead the dealer was given a letter which purported to allow a minimum commission, but the letter gave respondent the right to revoke its provisions at any time by written notice (R. 287-288). Under the new arrangement the dealer was to absorb 20% of the difference between authorized retail price and normal retail price when authorized prices went below "normal retail" prices (R. 285). Normal retail was $.045 per gallon over Union's Dealer Sales posted tank wagon price for both Royal 76 Gasoline and 7600 Gasoline (R. 282).

The change in commissions was to be effectuated as follows (R. 286):

"3. You will review the consignment agreements of those dealers who refuse to sign a mutual cancellation of such agreement and you will serve a thirty-day notice of cancellation at the applicable time. After such cancellation you will sign the dealer to the new consignment agreement and give him letter No. 1 which will be effective as previously stated. It is imperative that you do not miss a cancellation date because by doing so you could delay the effective date of this new commission policy by one year."

On April 15, 1958, the respondent again changed its commission schedules (R. 70-85). The consignee was to absorb changes in the retail prices by a sliding scale which provided for dealer absorption of 20% of any reduction in price below normal retail (R. 82-85). The instructions of respondent continued to be: "there will no longer be minimum commissions shown in the Consignment Agreement" (R. 76). Again, the respondent reserved the right to terminate the commission at any time by written notice (R. 79). The change in the consignment agreement was to be accomplished as follows (R. 77-78).

"1. New dealers will be signed to the new agreement and concurrently therewith they will be given the special letter which will be effective until all retail consignees in a specified geographical area are signed to the new Consignment Agreement.

2. Our present dealers will be urged to sign the new Consignment Agreement immediately and

concurrently therewith we will give them the special letter which will be effective as set forth for new dealers.

3. A thirty-day notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give him the special letter which will be effective as previously set forth herein."

(e) The record showed that the dealers paid respondent for the gasoline at the time of delivery for the delivered gasoline (R. 170-171, R. 80). The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied (R. 311). Thereafter the dealer paid respondent when the gasoline was delivered to him (R. 170-171, R. 80).

The dealer under the terms of the agreement pays the respondent the authorized price for gasoline, less his commission, but his commissions are dependent on the difference between Union's wholesale tank-wagon price and the authorized or minimum retail price (R. 99-100). Ordinarily the dealer will thus pay respondent the same price as he would if he had bought at respondent's tank-wagon prices. This would be subject to the provisions of the agreement which stated that when authorized prices were lowered to a point below respondent's posted minimum price, the dealer absorbed 50% of the difference (R. 100). This in turn would be subject to the provisions relating to a guaranteed commission (R. 100).

(iv) The Purpose, Effect and Means Used Pursuant to the Respondent's Retail Dealer Consignment Program

This appeal presents stipulations and undisputed facts as to the purposes, means used and effect of the retail dealer consignment program.

It is stipulated that the purpose of the retail dealer consignment agreement program was, among other things, to control retail sales price (R. 415, 429).[5]

The consignment agreement program was admittedly used to fix uniform and non-competitive prices in the western states by which all dealer choice was surrendered and by which Union determined to establish prices as a matter of its determination alone.

At times the uniform retail prices authorized by Union were to be higher than "major" competition. At times the prices were to be those charged by Union's competitor, Standard Stations, Inc. (Letters, 12/24/54, R. 223-224; 3/9/55, R. 231-232; 4/7/55, R. 246-248; 9/21/55, R. 255-256; 9/10/56, R. 276-277; 2/28/58, R. 281-284; 4/15/58, R. 72-76.)

As an example, effective March 1, 1958, the following was Union's consignment price policy in the western states, R. 282-283:

> "A. Normal or above normal markets, all areas: Prices on both Royal 76 and 7600 Gasolines will equal predominant competitive major gasoline prices.

[5]The stipulations of counsel for respondent as to purpose are set forth herein in Appendix C, Part I.

B. Depressed markets: Subject to General Provision C (1).

(1) In all areas excluding Montana, Wyoming, North Dakota and portions of Rocky Mountain Division covered in 4 B (2) below:

(a) 7600 Gasoline will be equal to predominant competitive major prices or Standard Stations, Inc., prices if latter are lower.

(b) Royal 76 Gasoline will be $.05 per gallon over the authorized 7600 Gasoline price, but not more than $.01 over predominant competitive major prices."

The authorized consignment agreement prices were to be policed. On April 7, 1955, the General Sales Manager, Dealer Sales, wrote Union's division officers, as follows (R. 247-248):

"We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Reps. and the Sales Manager are carefully policing the establishment of a new nominated price for any service station so that they know it conforms with our instructions as outlined above."

Price notification letters were used by Union informing the dealer of the specific price to be charged (R. 272-276). In addition, retail price changes were accomplished by telephone calls to the dealers, by visits of the Union agents to the stations, and by the prices shown on the gasoline delivery ticket at the

time of delivery of the gasoline to the dealers (R. 489). The dealer could not match the off brand dealers' prices, if desired (price policy letters, supra).

In order for the independent business man to lease a service station property from Union Oil Co. he had to sign the retail dealer consignment agreement. This is stipulated (R. 379-380; 386-387; 417-418).[6] The dealer "either takes the package deal or he doesn't take the gasoline station" (R. 417-418). In the words of respondent's counsel, "either he took our consignment contract and our lease or we wouldn't deal with him" (R. 380).

By the fall of 1956, the respondent determined to terminate all relations with all lessees and master dealers who refused to abide by the consignment program (R. 277-278). The company's instructions were as follows:

Letter, 9/10/56, R. 276-277:

> "We advised you that every possible effort must be continually exerted to get all of our dealers on a consignment program."

Letter, 10/17/56, R. 277-278:

> "Our attempt has been to strenuously solicit the change over from products contract to consignee agreements and this effort must be continued and accelerated as we expect that in the near future we will have to review every dealer that has not agreed to go along on our consignment basis to

[6]The stipulations of counsel for respondent as to the conditioning of the one year leases on the signing of the consignment agreement are set forth herein as Appendix C, Part II.

determine what action we need to take, even to the point of deciding that we should lose the business.

In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two-party deal or 'other' and the only paper we will write is a one-year consignment agreement."

In 1956 there were 765 cancellations of leases (R. 156). 559 cancellations were mutual cancellations for other than financial difficulties (R. 156. Compare with R. 286).

The one year leases of the respondent would not be renewed with a dealer who refused to follow the price fixing directions of the respondent. This is stipulated as has been seen at R. 379-380; 386-387; 417-418, 429, Appendix C, Part II herein. It was stated at the Pretrial Conference of May 21, 1959, at R. 401-402:

"The Court. Mr. Lasky, isn't it your contention that even if you do cancel out everybody that has a one-year lease and who violates the consignment agreement, that you are still entitled to summary judgment?

Mr. Lasky. Yes.

* * *

Mr. Keith. You specifically said on this issue that you felt it would be legal if the company would refuse to allow a lessee renewal of his lease if he didn't sign the consignment agreement, is that correct?

Mr. Lasky. Yes, I said that. That is my theory. And I also said that even if it were true that we had refused to renew four or five others for like reasons it wouldn't make any difference. I said that. . . ."

It is respondent's policy, however, to renew its one-year lease on a continual basis with all those who do follow Union's policies (R. 441, 450-452).

The independent service station dealer must invest substantial sums in order to go into the service station business (R. 66).

The record further showed that the effect of the retail dealer consignment agreement program was to effectuate exclusive selling of gasoline at thousands of outlets.

In 1957 respondent sold a total of 392,000,000 gallons of gasoline in the State of California to 2,365 stations (R. 334). At 2,364 stations there were no other gasolines dispensed except Union's (R. 336-337). Dealers were not allowed, under the consignment agreement program, to handle the gasoline products of other companies and repaint the stations (R. 434-435).

As heretofore stated, Union distributed thousands of gallons of gasoline to off-brand dealers who retailed at prices below the authorized retail consignment prices of Union.

One such off-brand company was Sunland Refining Company (R. 336).

The deposition of the Sunland representative disclosed that respondent's agents in Fresno had a con-

versation with the Sunland official about the price war in the area of petitioner's service station at 4010 E. Ventura Ave., Fresno, California in 1958 (R. 516). The representative testified that Union and other oil companies were "working" to bring the prices back up (R. 517-518).

4. The Undisputed Record in Summary Judgment Was That Respondent Refused to Renew Petitioner's Lease Because He Refused to Abide by the Price Fixing Directives of Respondent.

The stipulations of counsel for respondent appear at R. 409:

> "Mr. Lasky. . . . You said it would simplify the presentation of the case and therefore in the brief we have filed we have said for the purposes of this case we will now take the position we did not give him a new lease because he violated that consignment agreement. It is a conceded fact in the case that he did violate the consignment agreement because he refused to charge the prices which his principal, the Union Oil Company, prescribed for him to charge."

And see also R. 299.

5. The Unchallenged Facts As to Petitioner's Testimony of Coercion, Protest and Ouster.

The record shows the following testimony by petitioner in his deposition. Petitioner had been an employee of respondent (R. 302-303). After advancements, he was discharged from respondent's employ (R. 304-305). He was offered by Union any of its service station properties (R. 305). The service station site chosen by petitioner herein was a beautiful site (R.

307). It was described by respondent's representatives as a "good service station in the future" (R. 306). They were "glad to have me as a dealer" (R. 306). In order to obtain the station petitioner invested approximately $3,361 (R. 310-311). Union sold inventory to petitioner under a conditional sales contract for around $1400.00 (R. 310). The lease of petitioner provided the station was to keep open 16 hours a day (R. 23). The lease and consignment agreement were signed when petitioner checked into the station at 4010 E. Ventura Ave., Fresno, California. At the time of the signing of the one year lease in May, 1956, and the retail-dealer consignment agreement, petitioner said, " 'Do I have to sign this . . . and halfway jokingly and knowing that I had to' " (R. 309). During the period May, 1956 to the time of the signing of the second lease, petitioner had numerous conversations with representatives of Union. He requested more commissions, or asked for reductions in wholesale prices (R. 461, 462, 469). He remembered protesting the term "and will abide thereby" on the price forms of the respondent. He struck out the words (R. 473).

At the time of the signing of the second lease in May, 1957, petitioner protested the consignment agreement (R. 475). He did not remember the precise time involved, but remembered that he told the respondent's representative, a Mr. Pinochi, that he desired to be a purchase and sale dealer (R. 475). Petitioner testified he desired to set his own prices at all times (R. 316).

Starting in the Spring of 1957 (R. 65), the highway fronting petitioner's station was under heavy con-

struction (R. 65). In the fall of 1957 construction on petitioner's side of the highway commenced and petitioner's driveway was torn up (R 483).

In April, 1958, the competitors of petitioner lowered the price of their house brand gasoline to 27.9¢ (R. 486).

In April, 1958, petitioner requested that he be allowed to meet the price of 27.9¢ for regular gasoline from a Mr. Campbell, a Union representative (R. 484, 486). Petitioner's request was refused and he was told to charge a higher price (R. 485). Petitioner persisted in charging 27.9¢ (R. 486). A Mr. Christopher, Union's Division Sales Manager, Fresno (R. 93), then came marching into petitioner's station (R. 484). He wanted petitioner to "put my price up" (R. 484). Petitioner testified, R. 485:

> ". . . And I don't remember the exact words at all, but then they intimated by his actions and words that if I didn't put the price up to where they wanted it, which was two cents above my competitors, that I wouldn't get another lease. . . . I refused to put the price back up, and he said that he was going to call Los Angeles and Mr. Rath, and do everything in his power to force me to put the price back up. That is all I recall at this time of the conversation."

On April 21, 1958, petitioner was notified that his lease would not be renewed (R. 491-492). A Union representative, a Mr. Campbell, told Mr. Simpson that he had recommended that petitioner's lease be renewed if he would agree to conform to the consignment pro-

gram (R. 492). Mr. Campbell stated that the only reason the lease was not being renewed was that petitioner had set a price different than ordered (Id.).

Petitioner protested the lease ouster and did all he could to maintain himself as a lessee. Between the time of his notification of lease cancellation, on April 21, 1958, and the filing of his complaint for injunctive relief on May 21, 1958, petitioner attempted to obtain a change in respondent's determination to oust him by urging public support for his position (R. 37-42). He solicited his customers to send letters to the Chairman of the Board of Directors of Union (Id.). Respondent received 230 letters supporting petitioner's ability and position (R. 39).

Respondent, however, refused to change its position and dispatched its General Sales Manager, Dealer Sales (R. 37), Mr. Rath to visit petitioner. At the meeting with petitioner, Mr. Rath warned him not to oppose Union. Petitioner testified he was told as follows, R. 479-480:

> "Q. And what did you say to Mr. Rath and what did he say to you?
>
> A. I don't recall the exact words at all, but he came there that day. He had to come around about 4:00 o'clock to get in the place, because it was impossible to get—to come in the front way, and he remarked that they had me pretty well blocked off. They even had sawhorses across the street that he came down, and after pleasantries, he wanted to know how I was; he said that he heard that I had planned not to leave the service station when my lease was up, and I

said, well, I didn't know where he had heard it, but he said, 'Well, you are going to have to leave.' I said, well—I said very little. As a matter of fact, Mr. Rath did most of the talking, but I recall that he told me about two dealers down in Los Angeles that had refused to leave, and he said that they had thrown them out bodily, and he said that he, through his past associations and knowing me, didn't want to see me get hurt. And he also said the Union Oil Company had a lot more money than I did, and that it was foolish for me to try to sue them or anything, because I didn't have the money. And he said, 'You are going to go out when your lease is up, within the hour', as I recall, or words to that effect. Immediately, anyway. And I said, 'Well, maybe so, but you better keep it legal.' And he said, 'Whether we do or not, you are going to go out.' So that is mainly what I remember about the last conversation."

Petitioner had worked up to 16 hours a day, every day of the week for the two years, with only 14 days off work in the two years (R. 40, 67).

Following his ouster, he leased a Mobil service station on July 3, 1958 (R. 321). He went into partnership with another person, thus reducing his income by one half of that shown at R. 323.

6. Damages.

Respondent below submitted the damage calculations of the petitioner to the district court below and requested summary judgment on all issues including damages (R. 298; 313-314; 324-329).

Petitioner at no time indicated in any way he would be limited by the depositions as his only offer of proof on the damage issue. Just the opposite occurred.

The petitioner had been requested by the district court to file a statement of the nature of his evidence re damages and a memorandum in support thereof (R. 106, 108). The statement appears at R. 190-196. At no time did petitioner withdraw this pretrial statement.

7. Opinions Below.

The district court ruled that the retail dealer consignment program of the respondent was lawful (R. 355). It also ruled that petitioner had no actionable damages since Union had no duty to offer petitioner a new lease (R. 357-358). It also ruled that petitioner's damages were so speculative and conjectural that the case should not reach a jury (R. 358-359).

The opinion of the district court did not analyze the legality of the retail dealer consignment in terms of the purpose, means used, and effect of the price fixing program. As to the petitioner's action arising from the forced ouster, it ruled that there could be no injury since "Union was under no obligation to offer plaintiff a new lease even if plaintiff had complied with the terms of the consignment agreement," (R. 357). As to the claim for injurious impact arising from the coercive fixing of petitioner's prices, the Court ruled that both the doctrines of pari delicto and volenti non fit injuria precluded recovery (R. 359).

The Court of Appeals affirmed the judgment of the district court, but based its affirmance upon different grounds. It did not rule on the legality of the retail dealer consignment agreement program, but assumed it illegal (R. 570). Rather it held that petitioner had no actionable damages under the tort doctrine of "consent", Restatement of Torts, Sec. 892 (R. 571). It held that it was proper for an appellate court to determine whether or not there were categories of dealers who could not claim damages for forced ouster and loss of their business under respondent's scheme (R. 571). It then placed the dealers of Union into two categories; those who were under leases at the inception of the retail dealer consignment program in 1955 and those who leased property knowing of the respondent's demand that the consignment agreement be signed (R. 571). As to the latter, it held that these dealers had freedom to accept or reject the tendered lease and consignment agreement and thus had no claim for actionable damages from respondent (Id.). Thus, as to the claim for damages arising from petitioner's ouster, the court ruled that the original consent to the lease and consignment agreement prevented recovery under the doctrine of "consent". As to the claim for damages arising from the coercive fixing of petitioner's prices, the court ruled that petitioner could not predicate a claim on "coercion" since there was no inability to fix prices at desired levels, but only the risk that if prices were set according to the dealer's judgment, his lease would not be renewed (R. 572).

VI

SUMMARY OF THE ARGUMENT

Petitioner's claims for damages under Section 4 of the Clayton Act are well established under the decisions of this Court. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). This action is based on the use of a short term lease to support an unlawful retail price fixing consignment program. Petitioner attempted to set retail prices of gasoline delivered to him by Union at prevailing market prices while in business for his own account as an independent service station lessee. Respondent threatened petitioner that unless he conformed to the price orders of respondent it would do everything in its power to force petitioner to put his prices back up to those established by respondent (Answer, para. 17, R. 93; R. 485). Petitioner thereafter continued to establish market prices of his own judgment (Answer, para. 18, R. 93). The respondent refused to renew petitioner's one year lease because he did not abide by price orders (R. 409). Petitioner was to be made a conspicuous example of the futility of seeking freedom to set one's price in Union's regimented dealer structure (R. 479-480). As a result petitioner lost his service station business (R. 409). It was respondent's policy to renew indefinitely one year leases to all those who followed Union's policies (R. 441; 450-452). Petitioner had invested substantial sums for his business (R. 66).

Union claims the right to fix retail prices by using fear of loss of the service station business under the

doctrine that a single trader may consign its products to agents and fix the retail price of the agents. *United States v. General Electric Co.*, 272 U.S. 476 (1926). It claims that a consignor may destroy the business of a consignment agent for disobeying price orders.

But a major oil company that has control of thousands of service stations so that it has the power to impose an appreciable restraint on free competition cannot compel all those who desire to lease service stations to allow it to fix uniform, non-competitive market prices. It thus utilizes its leases to injure interstate trade and commerce by depriving independent dealers of the exercise of free judgments as to whether to become consignees at all and to sell in accordance with their own judgments as to price. The power to lease is not the power to regiment a marketing organization into an exclusive dealing, price fixed organization. Further, Union could not, compatible with the Sherman Act, adopt means which compel independent business men to abide by Union's price fixing orders. The right of "refusal to deal" does not embrace a system of compulsion by which dealers must obey price orders or lose their entire business. Whether the system be called consignment or resale price fixing is not material. These are bold, predatory and ruthless means which stifle freedom of competition. *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280 (1951). In *Richfield* it was held that a major oil company can not do business with independent lessees and master dealers, by compelling them to agree to

abide by its orders as to where they could obtain their gasolines and automotive accessory supplies by the means of cancellation of short term leases and by threatening to cancel all business relations with the independent dealers. It is urged that exactly the same unlawful means cannot be used by a major oil company to enforce a system of thousands of identical price fixing agreements in interstate commerce. The Sherman Act protects dealers from the use of predatory weapons which prevent them from doing business in accordance with their own independent judgments. Thus when companies adopt means which go beyond a mere refusal to sell supplies, and instead utilize a short term lease to coerce judgments as a means of regimenting prices, they are in violation of the Sherman Act. There is no anti-trust defense to such tactics. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). That a one year lease may be validly terminated for lawful purposes is not a defense to an action for treble damages when it is used for the purpose of fixing market prices against the independent judgments of those who are in business at their own risk and are facing competition in the market place. That lawful means may be used to control an agent's price under a bona fide consignment agreement, does not allow a defendant the right to use unlawful means to compel dealer obedience to price directions. *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

The refusal to renew petitioner's lease for the reason that he desired to set a price other than that fixed by Union on its competitive dealers not only caused petitioner to lose his business, but it also proved that his prices were coerced by Union while he was a dealer. As such he was a victim of predatory practices. Although a dealer faces the possibility of loss of business relations with a supplier for bona fide reasons, a supplier who holds real property marketing outlets is unable to control the competition of independent dealers by doing business only under short term lease forms and then refuse to renew the leases of those who do not abide by orders which restrain competition. The leases are wholly independent of the supply agreements. Under the Sherman Act, a supplier is unable to fix uniform and non-competitive prices on thousands of otherwise competitive dealers by the means of fear of non-renewal of short term leases. *United States v. Richfield Oil Company*, supra. Small independent dealers who experience the practice are victims of a predatory practice and are entitled to sue for both "in station" damages and damages based on the loss of a business under the Clayton Act.

Emich Motors Corp. v. General Motors Corp., supra;

Osborn v. Sinclair Refining Co. (4th Cir., 1960) 286 F.2d 832;

Ring v. Spina (2nd Cir., 1945) 148 F.2d 647;

Hartford-Empire Co. v. Glenshaw Glass Co. (W.D. Pa., 1942) 47 F. Supp. 711;

Allgair v. Glenmore Distilleries Co. (S.D. N.Y., 1950), 91 F. Supp. 93.

The means used by Union to compel price obedience whether unlawful per se or not cannot be used to support an unlawful system of identical price fixing consignment agreements promulgated for the purpose of fixing prices and used to effect the fixing of uniform and non-competitive prices in interstate commerce.

The respondent's retail dealer consignment program is in per se restraint of interstate trade. (1) Each retail dealer consignment agreement is in restraint of trade. It attempts to allow the right to fix retail prices of gasoline delivered to retail dealers. But the dealers have all the risks of ownership of the gasoline. Respondent required the dealers to share price decline risks. The dealers carried insurance on the gasoline and were liable for loss except as to natural catastrophies. The dealers were responsible for most of the costs and taxes on the business. Thus Union is fixing an owner's resale price. This is beyond Union's power. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *White Motor Company v. United States*, 372 U.S. 253 (1963). (2) Union compels all dealers to allow it control of prices of delivered gasolines. It thus regiments the dealer organization, precludes all price competition and fixes the amount the public shall pay. The use of non-renewal of a short term lease is as effective in constraining the dealers' prices as is an agreement with wholesalers to cut off errant dealers. The dealers have no alternative but to obey price orders. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). (3) Union used the consign-

ment agreement as a hub to compel all dealers to follow or go above the prices of major oil companies; the dealers were to follow such prices or lose their businesses. But the effect of such a system on interstate commerce is to regiment otherwise competitive dealers into charging the public uniform and non-competitive prices. Regardless of whether or not the consignment agreement is valid at common law, the effect of such a system is to accomplish that which the Sherman Act forbids, agreements to fix prices on commodities moving in the stream of interstate commerce. The federal courts are to look at the competitive realities of those who receive the delivery of commodities under price fixing agency agreements to determine whether or not the Act's prohibition of price fixing schemes has been violated. If the purpose is to fix prices of competitors and the agreements are used to establish fixed prices the promulgator of the scheme has violated the Sherman Act. *United States v. Masonite Corporation,* 316 U.S. 265 (1942). (4) Further, Union determined to police so-called consignment prices. It had representatives appear on the dealers' service stations to order prices to be fixed, threatened the dealers with lease non-renewal and refused to renew the leases of those who were reported as desiring to establish their own retail prices in accordance with their own judgments. This was a compliance system compelling obedience to price orders, and beyond the limited dispensation of the *Colgate* case. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *United States v. Parke, Davis*

and Company, supra. (5) Union's plan of fixing prices by identical price fixing agreements, not only violated the Act's prohibitions against price fixing, but it also violated other prohibitions. Union could not destroy the business of worthy men whose lives and personal fortunes were invested in the service stations' facilities in a dispute over the acceptance of a gasoline delivery, consignment price fixing agreement or over authorized prices. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941). (6) In the very area of asserted self justification, "agency", the facts proved that the retail dealer consignment agency effectuated exclusive dealings in Union's gasolines. Thus the claimed purpose of the respondent to deal only with agents and only with agents who abide by its orders effected a complete shut-out of competitive gasolines in thousands of market outlets in the eight western states (R. 336-337). This was in restraint of trade. *United States v. Richfield Oil Company*, supra. The consignment agreement was not only a price fixing agreement, but an exclusive dealing contract as well.

Finally, Union violated the provisions of Section 2 of the Sherman Act. The control of the prices and supplies of 3000 independent market outlets was the specific intent of Union and it succeeded in its goal. Predatory weapons of threats, of lease ouster, of policing, of asserting that it was foolish for the dealers to use the courts were used to accomplish this end. The service station dealers are independent business men who invest their personal fortunes in the stations, the

risks of the business are on them and they are entitled to the protection afforded by Section 2 of the Sherman Act from the plan to control their businesses shown here. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Eastman Kodak Co.* (D.C. N.Y., 1915), 226 Fed. 62.

The petitioner has proved the two elements of his Section 4, Clayton Act action: violation of the antitrust laws to his injury. *Radovich v. National Football League, et al.*, 352 U.S. 445 (1957). The Court below ruled that "consent" was a defense as a matter of law; that the petitioner knew that he would be injured when he voluntarily accepted the consignment plan promulgated by Union and used by Union as the only way it would do business. This, it was held, precluded recovery. Clearly this defense allows one to use a coercive tie-in as a means of escaping treble damage actions. The defense of consent is clear judicial legislation and is in conflict with this Court.

The cases of this Court which sustain the causes of action here, involved dealers who had knowledge of the defendant's scheme, or, had been in pari delicto with the defendant. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

The Sherman Act and Clayton Act were enacted to provide a remedy to independent traders against those who were coercing agreements in restraint of trade. The violations of the Sherman Act produces

two consequences; governmental action and private actions for treble damages. In the private action, any alleged unlawful conduct of the plaintiff does not legalize the unlawful conduct of the defendant nor immunize the defendant from liability to those it injures. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The plaintiff's knowledge that he will be injured by the defendant's violation of the antitrust laws if the plaintiff should violate the antitrust laws is not a defense to the defendant. *Moore v. Mead Service Co.*, 340 U.S. 944 (1951).

The Sherman Act has declared the wrong and has established the remedy. The federal courts are not free to add defenses to Congressional causes of action. The dealer of Union under the consignment agreement would be liable to Union for payment of the gasoline delivered to him. The dealer's protection against Union's restrictive policies is as a matter of Congressional purposes to be determined in a Section 4, Clayton Act action. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

The doctrine of "consent" cannot possibly apply to Sherman Act violations, because when the violation is assumed, as here, the defendant is, as a matter of judicial enforcement of Congressional purposes, utilizing powers beyond his rights. Private agreement does not erase the violation. Here, moreover, the complaint alleged and the proof showed actual economic coercion on independent business men. "Consent" and "coercion" are contradictions in terms. Restatement of Torts, Sec. 892. There is duress here:

the continuation of an expected long term business was used to deprive one of freedom of choice. Threats were made to the dealers that they agree to abide by Union's plan or face the consequences of loss of a business. This is not free consent; this is coercion. Restatement of Torts, Sec. 871, comment f, pp. 419-421; Restatement of Contracts, Sec. 492.

There is no defense available to respondent here.

In petitioner's second section of the brief, it is urged that the stipulations of respondent and undisputed evidence in summary judgment prove the violations of the antitrust laws set forth above. The record proving unlawful means, purposes and effect is in the form of stipulations and policy letters of Union's General Sales Manager. The undisputed evidence shows that the purpose, effect and means used by respondent to promulgate and maintain a system of identical price fixing contracts, regardless of dealer free choice or independent judgment, is in violation of Sections 1 and 2 of the Sherman Act.

It is urged in petitioner's third section that even assuming the stipulations and record of purpose, effect and means are not sufficient to determine liability in summary judgment, clearly petitioner is entitled to a trial by jury on all issues. *Poller v. Columbia Broadcasting System, Inc.*, supra.

VII

ARGUMENT

I. PETITIONER'S CAUSES OF ACTION ARE SUPPORTED BY THE DECISIONS OF THIS COURT.

A. The Decisions of This Court Involving Dealers Who Have Lost Their Supplies or Business Opportunities Because of Refusal To Abide by Demands Which Restrain Trade Have Sustained Claims for Damages Under Section 4 of the Clayton Act Regardless of the Dealers' Knowledge of the Suppliers' Unlawful Plans or His Participation in Them.

1. Petitioner's claim for damages based on loss of his business by the use of a short term lease as a weapon to control his price judgments as part of an unlawful price control system is well settled.

The first three questions of petitioner herein are phrased to state the undisputed facts in this case (R. 299, 409, 429, 401-402, 333, Appendix C, herein). Petitioner's causes of action are sustained by the decisions of this Court. This Court has ruled that when suppliers utilize the weapon of cancellation of leases, *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, (D. C. So. Cal., 1951) 99 F. Supp. 280; or cancellation of franchises, *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); or cancellation of licenses, *Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923), in order to compel the plaintiff to join an unlawful plan or as punishment for refusing to abide by the unlawful demands of the defendants they are liable for treble damages. Indeed, the mere refusal to deal with a plaintiff as part of an unlawful scheme or as punishment for not bending to the will of the defendant who is attempting to restrain or monopolize interstate

trade or commerce raises a private antitrust action. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Parke, Davis & Company*, 362 U. S. 29 (1960); *Radovich v. National Football League et al.*, 352 U.S. 445 (1957); see also *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied, 366 U.S. 963 (1961). See also *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 at 625.

That the use of the cancellation of franchises, contracts, and leases to support illegal plans under the Sherman Act raises treble damage actions even though agreements may be otherwise cancelled under their terms is well established. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); *Silver v. New York Stock Exchange*, ___ U.S. ___, 83 S. Ct. 1246 (1963).

See also *A. C. Becken Co. v. Gemex Corporation* (7th Cir., 1959) 272 F.2d 1; judgment for plaintiff, (D.C. Ill., 1962) 204 F.Supp. 28; affirmed, in part, (7th Cir., 1963) 314 F.2d 839.

The liability of the defendant or defendants has been sustained even though the plaintiff had knowledge of the defendant's illegal plans. Thus in *Emich Motors Corp. v. General Motors Corp.*, supra, Emich Motors had become a franchised Chevrolet dealer well after GMAC adopted a policy of meeting with dealers to demand that the dealers only deal in its financ-

ing. Emich Motors was a franchised dealer from the period 1932 to 1936 (340 U.S. 558 at 562). But the program of coercive tie-in by General Motors and GMAC commenced in 1925, (7th Cir., 1941) 121 F.2d 376, 394, cert. denied, 314 U.S. 618 (1941).

In the *Southern Photo Materials Co.* case, the plaintiff had dealt with the defendant as a dealer and had followed its restrictive policies prior to the defendant's cancellation of business relations with the plaintiff.

Further, there is no defense of pari delicto or consent available to the violator since the cause of action arises from the defendant's using the loss of commercial relations as a weapon to coerce the plaintiff following the plaintiff's protest and refusal to obey.

The law was summed by the Second Circuit in 1945, *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647, at 652:

> "Thus, it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dismissal. *Victor Talking Mach. Co. v. Kemeny*, 3 Cir., 271 F. 810; *Straus v. Victor Talking Mach. Co.*, 2 Cir., 297 F. 791; *Connecticut Importing Co. v. Frankfort Distilleries*, 2 Cir., 101 F. 2d 79; *Connecticut Importing Co. v. Continental Distilling Corp.*, 2 Cir., 129 F. 2d 651, certiorari denied . . . 317 U.S. 664 . . ."

In *Connecticut Importing Co. v. Frankfort Distilleries*, (2nd. Cir., 1939) 101 F.2d 79, 81, the Court specifically held that plaintiff's prior participation in an unlawful plan was irrelevant in an antitrust action

for damages arising from a refusal to deal by defendants as a result of plaintiff's refusal to abide by the conspiracy's price directions.

"The defendants assert further that the plaintiff cannot recover since, if there was an unlawful agreement, it was a party to it and so in pari delicto with them. The plaintiff has urged that such a defense is unavailable because not pleaded as required by the Connecticut procedure but we do not find it necessary to decide that. This cause of action did not arise in any event until Frankfort Distilleries, Inc., stopped supplying the plaintiff with its products and at that time whatever connection the plaintiff had had with the conspiracy was severed and it since has not been a party to that. This is not a suit in equity where the clean hands doctrine is applicable but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose. Cases like *Eastman Kodak Co. v. Blackmore,* 2 Cir. 277 F. 694, and *Bluefields S.S. Co. v. United Fruit Co.,* 3 Cir., 243 F. 1., upon which the defendants rely and which denied recovery for the period of the participation by the plaintiff in the conspiracy, do not extend to a subsequent period when the plaintiff was no longer a party to the unlawful agreement. This suit, on the contrary, is in this respect like *Victor Talking Mach. Co. v. Kemeny,* 3 Cir., 271 F. 810, where a party to an unlawful agreement in restraint of trade recovered damages suffered after he was no longer a party to that. As the plaintiff was not in pari delicto with the defendants after this cause of action accrued, there was no error in refusing to charge as requested in

respect to that subject. And for the same reason evidence as to price lists plaintiff filed with the Board of Trade showing the prices at which it sold the Frankfort products while it was in the conspiracy were properly excluded. What plaintiff did while a member of the conspiracy was immaterial."

This Court has subsequently held that the conduct of the plaintiff cannot legalize an unlawful plan nor immunize defendants from liability to those they injured, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). In *Moore v. Mead Service Company*, 340 U.S. 944 (1951) this Court reversed the decision of the Tenth Circuit (10th Cir., 1950) 184 F.2d 338, which held that plaintiff's knowledge that he would be damaged if he undertook to violate the antitrust laws on his own was a bar to recovery. Thus, this Court in reversing has held that plaintiff's knowledge that he would be damaged by the defendant, arising from his own antitrust violation, would not immunize the defendant from his violation of the antitrust laws to the injury of the plaintiff. The subsequent judgment for the plaintiff was affirmed. *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954).

It is respectfully submitted that if a plaintiff's illegal conduct does not legalize an unlawful plan, then, clearly the plaintiff's knowledge of an unlawful plan does not legalize an unlawful plan nor does it immunize the defendant from those coerced as victims of the plan.

Clearly Simpson has a cause of action under the facts stipulated by Union, that his lease was not renewed because he refused to follow price orders and that it was respondent's plan to compel obedience to its price orders by refusals to renew short term leases (Appendix C, Part II).

B. The Court Below Erred in Not Holding That the Richfield Case Prevents Union from Using Short Term Leases as a Means of Controlling the Prices of Independent Dealers.

1. A dealer is a victim of unlawful conduct in violation of the Sherman Act when he must do business under threat of the cancellation of short term leases unless he submits to price fixing orders.

It is respectfully submitted that petitioner not only has claims for damages for loss of his business arising from his ouster in an effort by respondent to force him to abide by retail price orders, but also, he has a claim for damages against respondent in being unable to fix his own prices while an independent dealer. While a dealer, petitioner was clearly under the coercion of respondent's price compliance system. As to these "in station" damages, the learned Court below ruled that a dealer is not under a legal "inability" to fix his own market prices even though he knows that if he does he will lose his business (R. 572). But such a principle is contrary to express congressional purposes. It denies federal protection to those entitled to freedom to trade. It is in violation of the Sherman Act when a lessor and supplier utilize the cancellation of short term leases in order to compel dealer obedience to price fixing orders. This, it is respectfully submitted, is the teaching of *United States v. Richfield*

Oil Company, supra. Clearly the learned court below was in derogation of antitrust law in holding that suppliers may fashion short term leases and then use the non-renewal of the leases as a weapon to cause fear in traders so as to promulgate restraints of trade. It is the rule of Congress that dealers placed under the compulsion of such a system have a treble damage action under the Clayton Act. *United States v. Richfield Oil Co.*, supra.

In *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied, 366 U.S. 963 (1961), the learned court specifically allowed a service station dealer to present his evidence under claims for "in station" damages suffered upon proof that the defendant oil company coerced dealers to buy Goodyear TBA under threat of lease cancellation.[1]

See also *Jewel Tea Co. v. Local Unions, etc.* (7th Cir., 1960), 274 F.2d 217 (on remand (N.D. Ill., 1963), 215 F. Supp. 839); *Hartford-Empire Co. v. Glenshaw Glass Co.* (W.D. Pa., 1942), 47 F. Supp. 711; *Allgair v. Glenmore Distilleries Co.* (S.D. N.Y., 1950), 91 F. Supp. 93; *Enterprise Industries, Inc. v. Texas Co.* (D.C. Conn., 1955), 136 F. Supp. 420, reversed on other grounds, 240 F.2d 457, cert. denied, 353 U.S. 965.

Further there appears no reason to distinguish the cases allowing damages to growers who sell products

[1]See the remand opinion *Osborn v. Sinclair Refining Co.*, (D.C. Md., 1962) 207 F. Supp. 856. The District Court's rejection of plaintiff's recovery for damages based on his losses suffered by reason of the loss of the service station business is urged to be in conflict with *United States v. Richfield Oil Co.*, supra; and is an erroneous attempt to isolate illegal tie-ins from the rules applicable to other unlawful restraints.

to a price fixing combination at prices fixed by the combination, and petitioner's claim for "in station" damages. In each case the damages suffered flow from the force of unlawful conduct. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Clearly Simpson has a cause of action for losses incurred each day he was a Union lessee when Union interfered with his ability to sell in accordance with his own judgments by coercing such free judgments in threatening to refuse to renew his one-year lease, and by the enforcement of a strict price compliance system on him.

C. The Doctrine of Consent Conflicts with Matters of Public Policy in the Judicial Enforcement of the Antitrust Laws.

1. A Section 4, Clayton Act action is based on acts which injure a trader, and a contract with the plaintiff cannot be used by the defendant as a shield to justify his conduct in violation of the antitrust laws.

This Court has specifically held that the remedy to a buyer who has been injured by reason of an antitrust violation by a seller but in receipt of goods or property from a seller is a treble damage action under Section 4 of the Clayton Act, and that the buyer cannot use the violation as a shield to the violator's damages for breach of contract. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). *Kelly v. Kosuga*, 358 U.S. 516 (1959). Thus the violator of the antitrust laws is not outlawed from the Courts. But it necessarily follows that if the violator of the antitrust laws is not barred from an action for breach of con-

tract against one with whom he has entered into contractual relations; clearly he cannot use the buyer's supposed knowledge and assumed consent to his unlawful undertakings as a shield to his antitrust liability under Section 4 of the Clayton Act. An agreement between the parties is not a shield to either party unless it can be said the Court is actually enforcing an unlawful program. To hold otherwise would mean that the victim has lost his rights under the Sherman and Clayton Acts, and is outlawed from using rights under bills designed specifically to give him a remedy, whereas the violator of the law would not be outlawed and can collect damages based on his contracts with the party injured by violation of the antitrust laws. But this is contrary to *Bruce's Juices*. "Consent" as a shield to antitrust liability thus produces an effect clearly in derogation of Congressional purposes. As such, it can not be sustained.

2. This Court has declared that there are no judicial limitations to the plain words of Section 4 of the Clayton Act and that Congress has specifically declared that the private antitrust action is a necessary consequence of antitrust violation.

It is respectfully submitted that the decision below conflicts with this Court's determination that the private antitrust action is a primary and direct cause of action to remedy a wrong done; an action which is not to be so construed as to prevent the right to trial by jury under doctrines which void the action as a matter of law.

The Court held in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), that

private actions under Section 4 of the Clayton Act were the necessary consequences as a matter of Congressional fiat of a violation of the Sherman Act. In *Radovich v. National Football League, et al.*, 352 U.S. 445 it was held that the Court were not to burden the private litigant beyond what was specifically set forth by the Congress. It held that plaintiff's "claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." (at 453)

Clearly, there can not be a "consent" defense consistent with Congressional purposes, when the judiciary is concerned with an antitrust action which involves price fixing agreements fashioned by a powerful oil company and demanded by it as the only manner of doing business. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

Coercion of independent traders under the Sherman Act raises causes of action, it does not end them.

The Congress not only allowed a remedy for coercion which restrains trade, but it actively encouraged the bringing of a Section 4, Clayton Act action by allowing treble damages and attorney fees.

The defense of "consent" is in conflict with the public policy of the Sherman Act as stated in the decisions of this Court interpreting Section 4 of the Clayton Act.

In *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *Edward Katzinger Co. v. Chicago*

Metallic Mfg. Co., 329 U.S. 394 (1947); *MacGregor v. Westinghouse Electric & Mfg. Co.*, 329 U.S. 402 (1947), this Court has held that estoppel doctrines could not be used to shield patents from antitrust attack. Otherwise rules of estoppel,

> "... would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act. ..." (*Sola Electric Co. v. Jefferson Electric Co.*, supra, at p. 177).

Thus, "consent" as a judicial bar to recovery is contrary to the doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *D. R. Wilder Manufacturing Co. v. Corn Products Refining Company*, 236 U.S. 165, 174-175 (1915). A very purpose of the Sherman Act was to allow small traders treble damage actions when huge corporate organizations demand that he abdicate his freedom to trade in accordance with his own business judgments.

Congress was acting, in part, in response to the fact that the powerful were demanding contracts depriving parties of freedom of trade. The Sherman Act is an anti-consent statute. It clearly covers situations, as here, where a powerful corporation has assumed the right to make dealers its servants when, under law, they are free and independent businessmen who invest their personal fortunes in their businesses and who assume the risks of the enterprise.

Sun Oil Company v. Federal Trade Commission, 371 U.S. 505 (1963).

Courts of law do award damages to the plaintiff when Congress has promulgated a specific statute to give him a remedy. The wisdom of such a remedy is a concern of the Congress and not the Courts. *United States v. South-Eastern Underwriters Ass'n., et al.*, 322 U.S. 533 (1944) at 553.

3. **The doctrine of consent by definition cannot apply to any antitrust action.**

Finally, the defense of consent cannot possibly apply to the private antitrust action since it is based on coercive means or unlawful plans.

The doctrine of consent by its very definition, Restatement of Torts, Sec. 892, contemplates a person of full capacity who *freely* and without fraud or mistake manifests assent to another. The doctrine can not be applied by the common law courts to actions which show duress. See Restatement of Torts, Sec. 892, comments, pp. 489-490. But duress as it relates to property interests is not limited to fear of bodily injury, but may be applied to cases in which threats of unlawful conduct directed against the other "deprives the other of a freedom of choice". (Id. at Sec. 871, comment f., pp. 419-421).

Clearly a defense based on the consent of an independent dealer cannot be used in a Section 4, Clayton Act action. The Sherman Act is a specific legislative enactment which seeks to protect those in an inferior bargaining position. But "consent" under the com-

mon law is not to be used to deprive actions to persons entitled to statutory protection. Restatement of Torts, Sec. 892, p. 490.

Further in a common law "consent" case, the consent is an invitation for the doing of the act upon which liability is based. It operates to erase the wrong. In an antitrust case, especially in this action, the private consent or lack of consent makes no difference to the violation established by Congress. Here, those who refused to abide by respondent's demands could not obtain a lease or they lost their businesses. The dealer had no choice. The program of the defendant, in restraint of trade, thus was promulgated and maintained regardless of the invitation of the dealers. It was a scheme pushed to the consequences of, "the only paper we will write is a one-year consignment agreement." (R. 278).

It is respectfully submitted that the defense of "consent" cannot be applied to the private treble damage action for the reasons shown here. It is inapplicable to this private antitrust action because Congress has protected independent traders from coercive demands of those who control sufficient economic power to impose an appreciable restraint on free competition. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958).

There can be, it is respectfully submitted, no legal bar to Simpson's claim for damages based on Union's promulgation of a plan designed to fix uniform retail prices and enforced by the refusal to renew one-year leases the loss of his freedom to sell in accordance

with his own judgment and the loss of his business thereby.

II

UNION OIL COMPANY OF CALIFORNIA HAS VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT IN PROMULGATING AND ENFORCING A PRICE FIXING SYSTEM OF CONTRACTS ON 3,000 DEALERS IN EIGHT WESTERN STATES.

A. Petitioner Has Established Liability Under Section 1 of the Sherman Act. As a Matter of Law Upon the Stipulations and Undisputed Facts in the Record.

Questions 5 and 6 herein raise the question of respondent's violation of the antitrust laws. By reason of the stipulations of respondent and the undisputed evidence, largely in the form of policy directives by the General Sales Manager of Union, the determination of the issue of violation of the Sherman Act to the injury of petitioner may, and it is respectfully submitted, should be made in summary judgment. *White Motor Co. v. United States,* 372 U.S. 253 (1963); *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958).

1. The means used by Union to compel acceptance of a price fixing products agreement and the weapons of threat to not renew one year leases, followed by ouster of errant dealers who failed to follow price fixing orders constitute coercion and are in violation of the Richfield decision.

It is respectfully submitted that Union could not compel the acceptance of an agreement which has an inherent potential harm to the freedom of interstate commerce and which was fashioned for the stipulated purpose of fixing the prices of thousands of competi-

tive dealers, by tying the agreement to its leases, and by preventing the dealers from rejecting price orders without forfeitures of their businesses. The means used by Union are unlawful.

The tie-in of the desired lease to the gasoline products consignment agreement (Appendix C, Part II) was coercion of the dealer's independent judgment, as a matter of law. *Standard Oil* and *Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Loew's Inc. v. United States*, 371 U.S. 38 (1962). In *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953), this Court stated, at 605:

> "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of the buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."

It is manifest that a company may not promulgate short term leases to hold over the heads of dealers and use them as a weapon to control the freedom of dealers to trade in accordance with their own judgments (R. 429; 401-402). This was a basic issue in *Richfield*. Judge Yankwich propounded the following issue, 99 F. Supp. 280, at 290:

> "So we come to the question: Is the independence, both legal and factual, created by the lease destroyed by the oral agreements and conditions superimposed by Richfield and which binds the lessee to the distribution of Richfield petroleum products and Richfield sponsored TBA products

under penalty rigidly enforced,—as the record shows,—of ouster unceremonious on 24-hours' notice, sometimes effected between sundown and sunup of successive days?"

Findings of the fact were then entered in part as follows at 297:

"(3) The relation established by each of the three types of agreements, L-O, 337 and 3-C, is that of independent contractor, each of the operators being an independent business man, as that term is understood in antitrust law.

"(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessees of L-O stations illegal restrictions as to the types of petroleum and sponsored TBA products to be handled on the premises.

"(5) The 24-hours' termination clause is invalid, against public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reversed one month.

"(6) Richfield should be prohibited from using the 24-hours' termination clause at all to enforce its restrictive conditions as to the products sold on the premises.

"(7) The agreements in the form of leases, sales contracts and/or painting contracts, and the oral agreements superimposed on them confine the operations of the stations to which they apply to dealing exclusively with Richfield petroleum

products and automotive accessories handled or sponsored by Richfield."

Clearly the use of threats of lease ouster unless price fixing directions are followed applied to independent dealers to control their free choice of prices, (R. 93, R. 247-248), is coercion of independent dealers in violation of the act. *United States v. Richfield Oil Co.*, supra; *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Motors Corp.* (7th Cir., 1941), 121 F.2d 376, and see *Ford Motor Co. v. United States*, 335 U.S. 303 (1948).

See also *Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961), affirming, per curiam, 187 F. Supp. 545, at 568-569.

Prices are fixed when they are coerced. Union, it is respectfully submitted, could not compel adherence to its price fixing orders by adopting the means of threatening to refuse to renew the one year leases of dealers who desired to set their own market prices. It could not compel adherence to its price orders by taking away the businesses of those who did attempt to become free re-sellers. It could not compel adherence to a tightly regimented price fixing system by ousting errant dealers from their businesses and thus making them conspicuous examples to those dealers who might seek to upset the regimented marketing system. Vertical price fixing by coercion is illegal per se. *White Motor Company v. United States*, 372 U.S. 253 (1963).

2. The retail dealer consignment agreement is in restraint of trade.

a. The purpose of respondent was to fix retail prices.

Agreements restrain trade when they are promulgated and enforced with the purpose to end competition between otherwise competitive parties or when they have that effect. Here it is admitted that the purpose of respondent's consignment agreement was to fix the prices of 3000 dealers in eight western states (Appendix C herein). But the prices fixed were the prices of businessmen who owned their own business, invested their own capital in the business and who assumed the risks of profit and loss. This is stipulated in respondent's answer (R. 91). But a purpose to fix prices of competitive merchants is an intent to accomplish a forbidden restraint. Agreements entered with the purpose of fixing prices in the competitive interstate market are in restraint of trade.

Any system of identical price fixing agreements utilized in interstate commerce entered into for the purpose of fixing the amount the public shall pay, eliminating all competition, and which requires all dealers who supply the public to abide by the price orders of a supplier is illegal per se. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 399 (1911); *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *United States v. Bausch & Lomb Optical Co.*,

321 U.S. 707 (1944); *United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corporation v. United States*, 309 U.S. 436 (1940); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *White Motors Company v. United States*, 372 U.S. 253 (1963). See also *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).

See also opinions of the Federal Trade Commission, *Federal Trade Commission v. Atlantic Refining Co.*, Docket No. 7471, C.C.H. Trade Reg. Rep., Para. 16, 422, decided May 16, 1963, rehearing denied, Para. 16, 472, and *Federal Trade Commission v. Sun Oil Company, Docket* 6934, C.C.H. Trade Reg. Rep., Para. 16, 418, decided May 15, 1963.

b. Virtually all the risks of ownership of the gasoline are on the retail dealer consignee.

But even assuming that the per se rule does not apply when parties are attempting to bona fidely change risks of ownership for reasonable business purposes, Union's system of identical contracts cannot be saved under the rule of reason. It is manifest from the provisions of the consignment agreement that Union has not kept the risks of ownership which would allow it to justify price fixing of competitive merchants. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, supra; *United States v. General Electric Co.*, 272 U.S. 476 (1926).

The "retail dealer consignment agreements" which purported to keep title to gasoline in the hand of respondent, in reality placed the risks of ownership on the dealer. The expenses of the business were on the consignee alone (Retailer Dealer Consignment Agreement of Petitioner, R. 95, Para. 3). The consignee was liable for all taxes or liabilities imposed on employees at the station (Id., Para. 4). He was liable for workmen's compensation for his employees (Id. at Para. 4). He was liable for personal liability insurance (Id. at Para. 4). He was responsible for all expenses, costs, licenses, fees and taxes levied on the business, and upon the handling, storage, sale and delivery of gasoline (Id. at Para. 5). He was responsible for the losses of the gasoline, except as to natural catastrophies (Id. at Para. 6). He paid for the gasoline upon delivery, for the gasoline delivered to him (R. 170-171, 80; and see Para. 7). The consignee had to absorb a substantial portion of price declines (R. 285-287, 72-85). Indeed, the only obligation of respondent was the payment of the property taxes on stored gasoline.

Respondent cannot claim to have maintained a guaranteed commission policy throughout the period of petitioner's occupancy of the station but required the dealers to absorb a portion of the decrease in market prices (Id.). The record showed that the failure to guarantee commissions was based on decision of Union to make the "amount of dealer margins" more competitive with the other major retail petroleum marketers (R. 72). The sham of consign-

ment is thus shown when the respondent upon the desire to be completely competitive in dealer participation in any reductions in prices below normal retail" (R. 72), simply decided to do away with guaranteed commissions (R. 285-287, 77-78). This was expressly done to have the dealers absorb a portion of the decline in prices (Id.).

Union, of course, did not utilize judicial enforcement of its supposed consignment agreement, the right to sue for damages for sale at less than the market price, but sought to compel dealers to abide by its price orders by means outside the law under the Sherman Act. But this shows that the consignment agreement was a mere sham to fix retail prices. Thus the incidents of consignment were not recognized by Union. California Civil Code allows the factor to sell at the market price after reasonable notice for reimbursement. Civil Code of California, § 2027. Yet petitioner was ousted from the service station for attempting to sell at market prices. A factor also may as a general rule renounce the agency at any time, 35 C. J. S., Factors § 7, p. 510. Here he may do so only by losing his entire business. A factor may generally be reimbursed for necessary charges and expenses, 35 C. J. S., Factors § 43, p. 541. Here, of course, petitioner can charge nothing to respondent. He obtains no storage allowance or insurance premium refunds. Finally, the so-called "commission" is simply a retailer's margin (R. 232).

It is thus clear that respondent did not promulgate or effectuate a true consignment agreement. Agency is

not construed when the clear purpose is to control the prices of the purported agents. See Klaus, Sale Agency and Price Maintenance: II, 28 Col. L. Rev. 441, cases collected 443-450. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is fully applicable here. The retail dealer consignment agreement clearly does not justify Union's fixing prices, since it has parted with virtually all risks of ownership. The dealers are not "retail consignees" at all, but are contemplated purchasers who buy to sell again; that is retail dealers. But the agreements prevent all room for competition between the dealers who supply the public.

3. The effect of the system of identical price fixing contracts was to regiment 3,000 independent businessmen and establish fixed and non-competitive prices.

But even assuming that the system of identical price fixing contracts is saved by a bona fide purpose to consign gasoline, still the system of identical contracts must fail because its undisputed effect was to completely eliminate price competition. Respondent used the system to fix uniform and non-competitive prices on 3,000 dealers in 8 western states (R. 223-224, 231-232, 246-248, 256; 281-288; 70-86).

Under the *Masonite* case, this Court has held that restraints of trade are to be examined in terms of their effect on competition and on the freedom of interstate trade and commerce. When agency agreements are claimed as shields to mask price fixing agreements between competitors, this Court has held that judicial inquiry is to start with whether or not

the parties who receive delivery of the goods are competitors. If so, and prices are fixed between competitors, the Sherman Act proscribes the forbidden effect. But here Union is dealing with dealers who compete among themselves. Or, the dealers compete with Union (R. 382-335). Or, the dealers compete with companies who buy gasoline from Union (R. 335-336). Or, the dealers compete with six major integrated oil companies. Union Oil Company has determined that the 3,000 dealers obey its price orders to follow the prices of these major competitors (R. 346; R. 281-284, 73-76). *Masonite,* it respectfully submitted, teaches that when the effect of identical price fixing agency contracts is to regiment the prices of 3,000 independent businessmen, such a system violates the Sherman Act.

4. Union's compliance system bound the dealers to follow Union's price orders.

But even assuming that the system of identical price fixing contracts is not otherwise unlawful, any scheme or plan which compels independent business men to abide by the price directions of the supplier violates the Sherman Act. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *United States v. Parke, Davis and Company,* 362 U.S. 29 (1960). This is so regardless of whether the means in themselves are unlawful.

The undisputed evidence in the record discloses that respondent utilized an oppressive price compliance system, consisting of policing prices, reporting of

errant dealers, demanding obedience to price orders, threatening non-renewal of short term leases, actual ouster of dealers. Such evidence shows the use of means to fix retail prices beyond the power of Union or any supplier who has a price fixing program (R. 247, 484-487, 489, 491-492, 509).

This Court has held that the manufacturer is entitled to the exercise of his independent discretion in refusing to deal, just as a retailer was entitled to his independent discretion in determining prices under which he sells his products. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Then a refusal to deal standing alone does not require the abdication of a dealer's freedom to sell in accordance with his free exercise of judgment. But when the manufacturer *compels* the abdication of the exercise of free judgment as to prices by devices and means which compel individual obedience to price orders on fear of losing his business it has violated the act. *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *United States v. Parke, Davis and Company*, supra. When express agreements are used to compel obedience to price orders with the purpose of regimenting a marketing system and means are used to enforce the agreement in order to compel price obedience among thousands of competitive independent retailers an unlawful price fixing plan has been consummated. *United States v. Parke, Davis and Company*, supra. The means used here cannot be used to compel observance of prices in a price control program. The violation of

the Sherman Act occurs in the use of the compliance system, regardless of the form of agreement.

5. Union could not invite the public to lease its service stations, invest capital in them and then turn out those who desired to establish prices in accordance with their own independent judgments.

The respondent invited the small businessman to enter into business arrangements with it and invest thousands of dollars in the service station business. One year leases are offered, but the respondent boasts a general policy of continual renewal of lease with dealers who abide by the "policies and determinations" of Union Oil Company (R. 441, 450-452). The non-renewal of these leases to enforce price orders operated to drive out of the system all who exercised free judgments. "Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings". *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 467 (1941) citing *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 323.

6. Union violated Section 1 of the Sherman Act by promulgating and enforcing agreements which had the effect of substantially lessening competition and restraining trade in the purchase and sale of gasoline products at 3,000 independent market outlets.

The record further shows that the one year lease and consignment agreement plan effected exclusive

dealings in gasoline purchases of the 3,000 outlets involved. All retail dealers in California, under the retail dealer consignment agreement, except one, was selling Union Oil gasoline only (R. 336-337). The consignment agreement on its face purports to dispense gasoline through agents, and such agency avowedly establishes an exclusive relationship. But the dealer is beholden to the consignor in his purchases of gasoline by the use of the non-renewal of the one year lease. Thus the retail dealer consignment agreement program not only regiments judgments as to prices, but as to choice of gasoline.

The consignment program is thus invalid in the very area in which it is attempted to be justified. *Standard Oil and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Co.*, 343 U.S. 922 (1952) affirming per curiam, 99 F. Supp. 280.

B. There Are No Defenses to the Retail Dealer Consignment Agreement Scheme Shown Here.

1. Union's consignment agreement program failed to follow the General Electric case.

Even the claim that a single company, has a right to enter into bona fide consignment agreements with retailers cannot be used by respondent here. *United States v. General Electric Co.*, 272 U.S. 476 (1926). Union Oil of course determined to utilize illegal weapons to enforce its consignment program unlike the General Electric plan. But even assuming not, Union failed to carry the risks of title justifying its attempt

to control another businessman's prices. The risks of title were placed on the dealer by Union contrary to the very tests used by this Court in the *General Electric* decision in supporting its consignment program. General Electric there assumed all the risks of price decline. General Electric carried whatever insurance was needed and paid whatever taxes were assessed (272 U.S. 476 at 483). This is not the case with Union (R. 95-98; 284-288, 76-85).

C. Petitioner Has Established Liability Under Section 2 of the Sherman Act As a Matter of Law Based on the Undisputed Facts in the Record That Predatory Means Were Used to Control 3,000 Independent Market Outlets.

The attempt to monopolize interstate trade or commerce occurs when one with the power to do so intends to control prices or destroy competition. *United States v. Aluminum Co. of America* (2nd Cir., 1946), 148 F.2d 416, 431-432; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953).

It was the purpose of the Congress in enacting Section 2 of the Sherman Act to make certain that no plan or scheme of the size and scope shown here, utilizing the predatory weapons shown here, could escape the prohibitions of the Sherman Act. Justice White in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), at 60-61:

> "And a consideration of the text of 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded."

The dealers of major gasoline companies operating under the lease used here have been held by this Court to be independent market outlets. They are not the conduit of their suppliers. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Company*, supra. They are entitled to be free of monopolistic plans or schemes of powerful gasoline suppliers. These oil companies are not free to deal with lessees as independent business men, allow them to invest their personal fortunes in the business and then claim they are not a separate market for the purposes of Section 2 of the Sherman Act. In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) this Court dealt with the plan of closely affiliated companies to control the operation of Yellow Cabs in four major United States cities and to control the purchases of these cab operators.

This Court held that an attempt to monopolize an appreciable segment of interstate cab sales was sufficient to constitute an actionable violation of Section 2 of the Sherman Act. There the cab sales involved some 5,000 licensed taxicabs in four cities. Here they are with approximately 3,000 independent outlets. The respondent here has sought to control or monopolize these outlets in spite of the fact that these dealers had invested their own funds for operation of the service stations and had gone into business for their own account, assuming the risks. The actions of the respondent allowed it to absolutely control these 3,000 independent market outlets.

The use of short term leases and the non-renewal of these leases constitute predatory weapons to control the business judgments and opportunities of these dealers.

A specific intent to control an appreciable segment of the market is shown by the evidence of predatory means being adopted to destroy the competition of dealers. This is clear evidence of an intent to monopolize. *United States v. Eastman Kodak* (D.C. N.Y., 1915), 226 Fed. 62, 77, 78; *American Tobacco Co. v. United States* (6th Cir. 1944), 147 F.2d 93 at 113:

> "The use of such methods and compulsions, brings the conduct of appellants, acting separately, within the rule announced in the Beech-Nut case with respect to restraint of trade. Moreover, the conduct of any one of the appellants, considered apart from a combination among all or any of them, is evidence of an intent to monopolize. 'The devising of means for * * * fixing sales prices, or adopting regulations for governing dealers, to be enforced by special rewards or penalties, inevitably result in concentration of business in the hands of a few, and may also result in giving to a single person or corporation such a unification of interest or management as to constitute an illegal monopoly * * * the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidence of an intention to promote a monopoly' United States v. Eastman Kodak Co., D.C. 226 F. 62, 77, 78."

The District Court below held that *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, was applicable here to bar petitioner's Section 2 action. But when a specific intent to destroy competition by unlawful means is shown the relevant market test in the *du Pont* case is not applicable. See 351 U.S. 377, footnote 23, at p. 395. Here, the competition of errant dealers was destroyed. See *Times-Picyune Pub. Co. v. United States*, 345 U.S. 594 at 611; *United States v. Aluminum Co. of America* (2nd Cir., 1945), 184 F.2d 416 at 431-432; *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959). The threats of the non-renewal of short term leases, and the final destruction of the businesses of the dealers who refused to comply with the price control program was "bold, relentless and predatory commercial behavior" manifesting a specific intent to monopolize as a matter of law. *Jerrold Electronics Corp. v. United States*, 365 U.S. 567, affirming per curiam, 187 F. Supp. 545, at 568-569. The respondent did not only refuse to rebut this evidence, it affirmatively stipulated that this was its policy (Appendix C, Part II).

The power or ability of Union to monopolize is without question. Respondent is a corporation with over a half a billion dollars in assets (R. 201) and has 11% of the service station gasoline sales in the State of California alone. The success of the program of regimented control was shown, and there existed control over the price and product judgments of an appreciable segment of the market. A single oil company of this size with control of prices as

shown here is a menace to freedom of entry into the gasoline industry.

The control of a marketing force, and the ability to control prices instantaneously even if unexercised makes Union an imminent threat to freedom of entry into the retailing of gasoline. See *Ethyl Gasoline Corporation v. United States,* 309 U.S. 436 (1940) at 458.

It would appear manifest that this was Union's ultimate goal, and that it has succeeded in attempting to monopolize an appreciable segment of the market. Its power and successful control of retail prices at 3,000 independent market outlets stands as a menace to any competitor not so equipped. As such the Courts are to nip the plan in the bud. *United States v. Aluminum Co. of America* (2nd Cir., 1945), 148 F.2d 416, at 431-432; *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

III.

EVEN ASSUMING THE RETAIL DEALER CONSIGNMENT AGREEMENT SCHEME IS NOT PER SE IN VIOLATION OF THE SHERMAN ACT, PETITIONER HAS ESTABLISHED A PRIMA FACIE CASE ENTITLING HIM TO A TRIAL ON THE MERITS.

Question 4 herein raises the right of petitioner to a jury trial. The petitioner, it is respectfully urged cannot be deprived of a trial on the merits. Clearly he has sustained a prima facie case. Even assuming that the record, construed against petitioner, is held

to be outside the per se rule, it would necessarily disclose issues of fact as to liability. *Poller v. Columbia Broadcasting System, Inc.*, supra. Clearly, also, there is a factual dispute as to any consent of the petitioner to his causes of actions here, assuming the doctrine to be available as an affirmative defense. It is urged, however, that there is no legal bar to petitioner's right to a trial by jury under Section 4 of the Clayton Act, "a Charter of Liberty, a Bill of Rights."

CONCLUSION

It is respectfully urged that the Court hold upon the record before it that the retail dealer consignment agreement program is void under Sections 1 and 2 of the Sherman Act, and that the cause be remanded solely on the issue of damages suffered. Or, in the alternative, that the judgment below be reversed and the case ordered to trial on all issues.

Dated, San Francisco, California,
September 6, 1963.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U.S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, as amended, 69 Stat. 282 (1955) 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U.S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the

cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 16, October 15, 1914, Chap. 323, Sec. 16, 38 Stat. 737, 15 U.S. Code, Sec. 26:

"That any person firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Appendix B

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the

motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Appendix C

PART I

Stipulations that the purpose of the retail dealer consignment program was to fix retail prices.

At the pretrial conference of February 11, 1960, R. 414-415:

"Mr. Keith [counsel for petitioner]. But, your Honor, they are very vague on that; they do not say or they are not willing to stipulate; if they are willing they can do that right now—are they willing to say that the purpose and intention of the consignment program as it affects approximately 3,186 retail consignees was for the purpose of controlling, the purpose and intention to control and fix resale prices?

The Court. Among other things.

Mr. Keith. I don't think we have gone that far yet.

The Court. I think you have conceded that in your argument, haven't you, Mr. Lasky?"

Mr. Lasky [counsel for respondent]. There isn't any doubt, if the Court please, that by use of the consignment method we do control prices at which our gasoline is sold to the consigned stations.

The Court. And that's one of the purposes of the consignment policy, isn't it?

Mr. Lasky. Sure.

Mr. Keith. Is that the purpose?

The Court. Well, Mr. Keith, you can't——

Mr. Keith. All right. It's a purpose. All right so we have that straightened out. * * *"

At the Pretrial Conference of February 11, 1960, R. 429:

"The Court. That has been conceded, hasn't it, the first two points—the purpose of the contract among other things is to control the retail sale price?

Mr. Lasky. We have stated our position on that and I don't see any issue of fact on it.

The Court. And the consignment contract in combination with the lease was to carry out the policy of the defendant oil company insofar as maintaining a price schedule for retail distribution.

Mr. Lasky. This was one of its purposes.

The Court. Those are the first two things you had in mind, Mr. Keith, and I think they are both conceded in sufficiently definite form to eliminate those as issues."

PART II

Stipulations that the Union Oil Company would only lease property for a one-year period and conditioned the obtaining of the desired lease on the signing of the retail dealer consignment agreement. Failing to sign the consignment agreement or following Union's price directions, the dealer could not obtain a lease or a lease renewal.

At the pretrial conference of April 30, 1959, R. 379-380:

"Mr. Lasky. Now, I can put the issue of coercion, I think, in a fashion that allows your Honor to dispose of it, or pretty close to it, which is this: Counsel alleges—this is one of the questions we put in the agenda—when plaintiff al-

leges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products and the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

The Court. That is precisely what you mean by the word 'compel'?

Mr. Keith. This statement is correct.

The Court. And to the extent that that may be regarded as (sic) coercion, you will stipulate to that, is that right, Mr. Lasky?

Mr. Lasky. Why, yes. I don't stipulate it is coercion, but I say these are the facts.

The Court. If that constitutes coercion——

Mr. Lasky. Then we coerced him.

The Court. And you compelled him to follow this practice?

Mr. Lasky. We had a consignment contract with him and we expected him to live up to it."

At the pretrial conference of April 30, 1959, at R. 386-387:

"Mr. Keith. That your lease will not be renewed unless you agree to sign the retail dealer consignment agreement; is that the stipulation on that?

Mr. Lasky. I haven't gone quite that far.

The Court. I think you came pretty close to it.

Mr. Lasky. Pretty close to it. I said the only way we coerced the man into accepting a consignment agreement for a lease is by refusing to deal with him on any other basis. We say to him, 'This is the kind of lease we have and this is the kind of dealer supply contract we have. If you don't want this, we don't deal with you." I will stipulate to that.

The Court. That is just exactly what your position is, isn't it, Mr. Keith?

Mr. Keith. Yes, but I mean——

Mr. Lasky. If that is coercion, let the conclusion follow. We deny that it is.

Mr. Keith. You tie the two agreements together and refuse to lease if the man does not sign the retail dealer agreement, and if he doesn't abide by the retail dealer agreement, the lease is cancelled.

Mr. Lasky. No; his lease is not cancelled.

Mr. Keith. Or not renewed.

The Court. It is not renewed.

Mr. Lasky. Well, we can't cancel.

The Court. You can't cancel, but you won't renew it.

Mr. Lasky. You see, that is not in fact the truth of our situation. From a legal position——

The Court. You contend that under the law you don't have to renew it——

Mr. Lasky. That is right; that is my contention."

Pretrial Conference of Feb. 11, 1960, at R. 417-418:

"Mr. Keith. That there was no free choice; the dealer was not offered: You can either be a

purchase and sell dealer or you can be a consignment dealer. This was not offered to the dealer. He was told you have to be a consignment dealer or you will not get any lease extension.

The Court. As I understand it that isn't an issue; the defendant company has not contended that the dealer has any option at all; he either takes the package deal or he doesn't take the gasoline station.

Mr. Lasky. We have said, for the purpose of this case, we have said so."

At R. 419:

"Mr. Keith. And that it was used without free bargaining, that it was used by the instrumentality of the 1-year lease, there was no free bargaining and——

Mr. Lasky. We have said for the purposes of this case it could be taken that this is the basis upon which we give a man a lease, no other."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief

OPINIONS BELOW

The opinion of the Court of Appeals (R. 564-73) is reported in 311 F.2d 764. The opinion of the District Court (R. 347-60) is reported in 1961 Trade Cases ¶ 69,936, p. 77,693. A prior opinion of the District Court, denying a preliminary injunction (R. 42-4), is reported in 162 F. Supp. 746.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1963 (R. 574). This Court's jurisdiction was invoked under 28

All emphasis in this brief added unless otherwise noted. The notation "Br." refers to "Petitioner's Opening Brief."

U.S.C. § 1254(1), and the petition for writ of certiorari was granted April 29, 1963 (R. 575).

STATUTES INVOLVED

The statutes invoked by petitioner are §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693) and §§ 4 and 16 of the Clayton Act (Act of October 15, 1914, c. 323, §§ 4 and 16, 38 Stat. 731). These statutes are partially quoted in Appendix A to petitioner's brief.

In addition, the following statutes are involved: The McGuire Act (66 Stat. 631, 15 U.S.C. § 45 (a)(2) and (3), § 5(a) of the Federal Trade Commission Act as amended by the Act of July 14, 1952); the California Fair Trade Act, Cal. Bus. & Prof. Code, §§ 16,900-16,905; California Petroleum Labeling Act, Cal. Bus. & Prof. Code §§ 20,840, 20,849, 20,850, 20,851; also Cal. Civil Code §§ 2026, 2027.

These are all quoted in the Appendix hereto.

QUESTIONS PRESENTED

1. a) Since a consignment agreement requires the consignor's agent, the consignee, to sell the principal's goods at prices directed by the principal, does it violate Section 1 of the Sherman Act for a manufacturer (here a gasoline refiner) to sell directly to the consumer by means of consignment? In other words, is the agent's agreement to follow his principal's price instructions on sale of the principal's goods a violation of Section 1?

b) Assuming, *arguendo*, that the answer to the foregoing question would otherwise be "yes", is not the answer nevertheless "no" because of the McGuire Act and the California Fair Trade Act (the locus of the events being California)?

c) The refiner possessing nothing even remotely resembling a monopoly of the gasoline business or of service station sites, does the refiner violate the Sherman Act by declining to lease

a service station except to one who agrees that any gasoline he obtains from that refiner will be handled by him as a consignee, i.e., an agent of the refiner?

2. a) Can one party to an agreement recover from the second party damages said to flow from the first party's own voluntary performance of the agreement on the ground that, *arguendo*, it violates the antitrust law? Specifically: During the time he was a consignee, a dealer ignored the prices specified by his principal for sale of its gasoline when he saw fit and charged those prices when it suited him. May he recover damages for supposed loss of profits claimed to flow from charging the specified prices on the occasions when he saw fit to charge them?

b) Absent a conspiracy, can a person demand that another lease real property to him on terms to be fixed by court or jury or pay him damages on the ground that the only terms on which the owner is willing to lease would be, *arguendo*, incompatible with the antitrust law? Specifically: may one recover damages for refusal of a gasoline refiner to lease a service station to him because, while he was a lessee under a former but expired lease, he violated the terms of a consignment agreement under which he received gasoline from it?

3. When a plaintiff has been given every opportunity in extensive pre-trial and discovery proceedings to formulate his contentions and assemble his case, assures the court that, in view of stipulations of fact by defendant given to him in response to factual contentions, there are no issues of fact and he has nothing to submit to a jury on liability, in response to defendant's showing on its motion for summary judgment makes no showing that any such issue exists, and himself moves for summary judgment, was the case not ripe for summary judgment?

4. Where the plaintiff in a private suit for damages under the antitrust laws is not engaged in interstate commerce, and neither the activities of defendant claimed to have injured plain-

tiff nor their impact on plaintiff occurred in interstate commerce, is application of the Sherman and Clayton Acts supported by the fact that the defendant engages in interstate activities?

STATEMENT OF THE CASE

The plaintiff and petitioner will be referred to as "Simpson" and the defendant and respondent as "Union".

While Simpson seeks relief under the antitrust laws, not only is there but one defendant but the case involves the conduct of that one acting alone. At an early pre-trial conference Simpson conceded (R. 369): "This is not a conspiracy case. This is a case of action and activities of a single defendant" (So also R. 395): And he repeated at subsequent hearings that "the complaint does not charge conspiracy" (R. 395). As observed by the District Court on deciding the case, "Plaintiff has conceded that the instant case involved the activities of a single defendant and that it is not a conspiracy action." (R. 354.) And, as we see at pp. 16, 64 below, this case involves no monopoly.

A. The parties and their relationship.

1. UNION AND ITS METHOD OF MARKETING ITS GASOLINE.

As observed by Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, there are three different ways in which refiners or suppliers of gasoline market their product.[1] One way is to sell directly at retail to the motoring public through wage-paid employees. Another is to sell directly at retail to the motoring public through consignees, that is, to sell through dealers engaged as commission-paid agents of the refiners. The third is to sell to retail dealers who resell to the public. Sometimes the dealer, whether consignee or purchaser,

1. Simon N. Whitney, Antitrust Policies (Twentieth Century Fund, New York, 1958), Volume 1, p. 126.

owns or leases the station from a third party, and sometimes he leases the station from the supplier.

Union is one of the very many producers, refiners and marketers of gasoline on the West Coast (see p. 17, infra). In order to develop outlets for its gasoline it has acquired a possessory interest (either the fee or a lease) in approximately 1335 service stations in California and 740 in eleven other states, and it markets its gasoline through these and through 2219 other stations in which it has no property interest at all; of the latter, 1030 are in California (R. 333, Br. 13). Except for 12 training stations in California and 2 in Washington, it does not operate any of the stations it owns or on which it has a lease but leases or subleases them.

Before 1955 Union's method of marketing its branded gasoline was by sale to retailers for resale by them. Late in 1954 Union contemplated a policy of consigning gasoline to dealers, in certain localities in certain situations, for sale by them as its agents (R. 223-230). But it never put that policy into effect. When in 1955 it finally did put consignment into effect, it did so as a permanent measure (R. 233), and by 1956 consignment had become the only method by which Union would market its branded gasoline through its own stations, that is, those on which it owned the fee or a lease (R. 278).[2] New lessees were taken on only as consignees, and as contracts of sale with former dealers expired, the custom of those not wishing to be consignees was given up (R. 278). By 1957 Union sold gasoline *to* only three dealers in California who leased stations from it (R. 334; also R. 199 at 200). It sold directly *to* consumers *through* its other dealers, as consignees.

As more fully detailed at pp. 13-15 below, under this consignment method of marketing Union remains the owner of the gasoline, and the consignee as Union's *agent* sells Union's gasoline. The dealer's reward is not a profit from resale with a risk of loss

2. This summarizes the series of directives reviewed in petitioner's brief at pp. 15, et seq.

but a guaranteed commission from Union. Since Union owns the gasoline and the dealer is merely its agent to sell, Union determines the price at which the gasoline is to be sold.

2. SIMPSON AND HIS RELATION TO UNION.

For about 8 years prior to 1956 Simpson had been one of Union's wage-paid employees. His last salaried position was that of its representative to its dealers in one district. As such he had discussed Union's consignment method of marketing with his immediate superior, read and became "pretty familiar" with the consignment agreement, and was Union's employee who presented and explained it to each of the 32 Union dealers in his district (R. 302-4).

He ceased to be an employee when he wrecked a company car and pleaded guilty to a charge of drunk driving (R. 424, 305). He then wanted to become a Union dealer and sell its gasoline, and Union was willing to lease to him an available station. At that time Union had a lease on a parcel of land in Fresno, California, bearing a gasoline service station (R. 37), and Simpson decided he wanted to sublease it from Union (R. 305-6). He knew that Union *would not sell gasoline* to dealers but would only consign (R. 63). With full knowledge of this fact and of the form of lease and consignment agreement he chose to take a lease of the station. He testified concerning the occasion when the documents were presented to him by Union's representative for his execution (R. 309):

> "A. Well, as I recall our conversation being two retail representatives one to the other, there was some conversation which is such as; 'Do I have to sign this crap?' And so on, and half-way jokingly and knowing that I had to. I mean as near as I can remember that is what it amounted to.
>
> * * *
>
> "Q. Can you recall anything else about that conversation respecting the signing of these papers?
>
> "A. No, not especially. It was all cut and dried. *I understood it then, and they knew I understood it,* as far as that is concerned."

May 23, 1956, by written lease, Simpson subleased the station from Union for a term of one year, subject to termination by Simpson (but not by Union) on 30 days' notice. In 1957 Union gave Simpson a new one-year lease ending by its express provisions on May 22, 1958.[3] Concurrently with the first lease, Simpson and Union executed a written Retail Dealer Consignment Agreement terminable by either party at the end of any year and ceasing, under paragraph "Eighth" (R. 101), on any termination of Simpson's right to occupy the station.[4]

April 1958 Union notified Simpson that it was terminating the consignment agreement at the end of its year (R. 36A, 36B) and would not offer him a further lease (¶ 25, R. 56). Thus all contractual relations between the parties expired by the terms of the contracts, on May 22, 1958.

B. The proceedings below.

May 21, 1958, "the day before his lease was to expire"[5] Simpson brought this action to enjoin Union from taking possession of its property and from leasing the station to anyone else (Prayer 5, R. 13), and obtained a temporary restraining order. June 3, 1958, the court denied an interlocutory injunction (R. 42), *Simpson v. Union Oil Company*, 162 F. Supp. 746, holding that both the lease and the consignment agreement had expired and that it could not compel the making of a new lease.

With the restraint of the restraining order thus removed, Union sued Simpson in a State court for unlawful detainer of the property and obtained a judgment adjudicating that at all times after May 22, 1958 Union was entitled to possession of the service sta-

3. The leases appear in full at R. 19-36; authenticated by Simpson at R. 199.

4. The consignment agreement appears in full at R. 95-102 and is authenticated by Simpson at R. 199.

5. So phrased, correctly, in petitioner's brief, p. 7.

tion.[6] Simpson then surrendered possession pursuant to the command of the State judgment.

He then amended his complaint in this action to seek damages in lieu of equitable relief (R. 46). Union moved for summary judgment (R. 60). Denying this motion in order to permit Simpson the opportunity to "throw more light upon the alleged claim" by further discovery and "without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion can be based" (R. 87-88), the court[7] observed that the "plaintiff's case is extremely thin".

The court then took control of the litigation and initiated a series of pre-trial conferences (R. 108). Although as the Court of Appeals below observed (R. 569), "to say the least plaintiff's contentions vacillated", they were finally pinned down, and to the end of eliminating possible issues of fact Union stipulated to facts claimed by Simpson. At the District Court's direction Simpson filed a "Pretrial Statement for Pretrial Ruling", in which he stated his contentions (R. 199) which was to supersede his complaint (R. 399). After extensive pre-trial and discovery[8] had sharpened and clarified the issues, Union again moved for summary judgment (R. 298). At the hearing (R. 407, et seq.) the court called on Simpson's counsel to specify what issues of fact he claimed remained. The colloquy (R. 412-35) ended with Simpson's admission that there were no longer any issues of fact tendered by him on the

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6. Exhibit B to Union's answer is a certified copy of the judgment (R. 105-6).

7. This was by a District Judge other than the judge who had denied the motion for interlocutory injunction. The eventual judgment was by still a third judge.

8. In addition to interrogatories and requests for admissions (e.g., R. 69, 111, 332) and inspection (e.g., R. 108, 212), Union took Simpson's deposition (R. 300, 452) and Simpson took six depositions, including those of the Chairman of Union's Board of Directors (R. 441), of its Fresno Division Manager (R. 343) and of three others (R. 493, 525, 539).

question of violation of law in view of Union's stipulations.[9] Thereafter Simpson himself moved for summary judgment on the issue of liability (R. 337-436). In due course his motion was denied, Union's was granted with an opinion (R. 347), judgment of dismissal was entered (R. 360) and was affirmed on appeal (R. 574).

C. Simpson's conduct under the agreement.

Before Simpson entered into the second one-year lease, he conceived the notion that a consignment agreement was illegal (R. 312). He could have terminated the consignment relation in any one of three ways: (1) By terminating the lease, as he could do by a 30-day notice whereupon the consignment agreement would terminate; (2) by notice at the end of the year (see p. 7 supra); or (3) by simply declining to receive gasoline from Union, since neither the consignment agreement (R. 95-102) nor the lease (R. 19-27) obligated him to take any gasoline from it. He was free to buy, sell or handle the products of anyone else. (See further discussion of this at pp. 13, 20, 21, infra.)

Simpson did none of these things. Although believing the consignment agreement to be illegal, he chose to sign a new lease thereafter in April 1957 (R. 312) and to continue with the consignment agreement. However, he then refused to abide by its terms and sold Union's gasoline at whatever prices he pleased in disregard of its instructions (R. 312, 313). As he says in his brief (p. 34) he "continued to establish market prices of his own judgment."

D. Simpson's claims.

Simpson asserted two *and just two* claims of injury.

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9. See further discussion of this at pp. 32-38, infra.

1. FIRST CLAIM—FOR $1000.

Paragraph 29 of the amended complaint asserts (R. 57) that Simpson was damaged in the sum of $1,000 because he was "unable to fix the prices of his gasoline during the period May 1955[10] to March 1958." His original complaint claimed that Union told him that he had to charge more than he wished to do (R. 11). When he amended his complaint to seek damages, he reversed this position, his claim being that Union wanted him to keep his prices down, as was made clear by his deposition.[11] There, in response to questions how he calculated the $1,000, he produced two computations (R. 319, 324-29), which assume that he would have sold at higher prices the same amount of gasoline he actually sold and that if he had been a purchase and sale dealer instead of a consignee he thereby would have made $1,000 more.[12]

2. SECOND CLAIM—FOR $150,000.

The second claim, stated in paragraph 30 of the amended complaint, asserts (R. 57) that Simpson was damaged in the sum of $150,000 because he was "unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interests as a lessee to a successor of his own choosing, was prevented from selling his 'good will' and was prevented from obtaining the fair market value of his business".

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10. 1955 is an error. The date when he became a consignee was 1956, as noted in petitioner's brief at p. 7.

11. "A * * * The phone rings and the man tells me to put my price down. I hadn't noticed any reduction in business, there is no question I wouldn't have had my price lowered until there would have been some obvious effect in my business. You don't need to sell something cheaper than you have to until you find a need for it in my business." (R. 465)

12. One computation was entitled, "Minimum Margin Needed to Operate Profitably", and the other, "Supposing I Could Have Increased My Margin ½¢ Premium and 1¢ Regular".

This is but an overelaborate way of saying the same thing, namely, that Union would not give him another lease.[13] His figure of $150,000 was reached by assuming that he would have stayed in the service station for 15 years and estimating that he would have made a profit of $10,000 per year (Simpson's testimony, R. 313, 314).

Simpson contended that Union refused to give him a new lease on the expiration of his old lease on May 22, 1958 because of his violation of the consignment agreement (Complaint ¶¶ 24, 28; R. 56-57; Pre-Trial Statement, R. 203, 204, 210).[14] For the purpose of its motion for judgment, in order to bring the case to a sharp issue, Union stipulated that this is so.[15]

13. So far as "good will" refers to some value attached to a right of continued possession, there would be no good will to sell without a lease. So far as good will means some value not connected with a right of occupancy or a right to assign occupancy, it has never been claimed that Union either could or did prevent Simpson from selling whatever he legally owned. The lease granted to the lessee no right to choose the person to whom Union would lease the property after his term ended. Paragraph 9 (R. 35) provided that any attempt of the lessee during the term of the lease to assign it was grounds for immediate termination. *A fortiori*, the lessee had no interest which he could assign after termination. As the District Court below observed (R. 385):

> "The Court: I think a realistic appraisal of that situation indicates that there is nothing to sell, or there is nothing that is practically salable as a practical matter. You can't sell anything unless you can tie it in with the lease."

14. R. 204: "The defendant refused to allow plaintiff a renewal of his lease because he would not abide by the consignment prices fixed by defendant on his sales of gasolines to the public." This is repeated at R. 210.

So also, affidavit (R. 65): "I claim that the only reason that my lease was not renewed after May 22, 1958, was because of my attempt to set my own retail prices for Union Oil Company petroleum products as set forth in the complaint."

15. "Mr. Lasky: * * * For the purposes of this case and as a result of the pretrial conference we now come in and say he got no new lease, they declined to give him a new lease because he had violated the consignment agreement. Heretofore we have said to the Court we would argue the motion, any motion, upon that assumption. Your Honor asked us why we did not waive the other strings to our bow, [that] there were

3. THE PREMISE OF BOTH CLAIMS IS THAT CONSIGNMENT IS ILLEGAL.

It will be observed that the first claim is predicated on the fact that, during the period the consignment agreement existed, Simpson sometimes did abide by it, while the second claim is predicated on the fact that where it served his purposes he did not abide by it.

Both claims start with a premise that the consignment agreement was illegal as a price-fixing agreement. Obviously, Simpson cannot claim damages for having sold at prices required by a valid agreement or for Union's declining to enter into new contracts with a violator of a valid agreement.[16]

E. Simpson immediately obtained another station.

On receiving notice in April 1958 that he would not get a new lease from Union, he looked for no other station until the court, by its order of June 3, 1958, declined to compel Union to give him a new lease. He then bestirred himself (R. 314, 315). There being a multitude of service stations and competing refiners in California, Simpson speedily, on July 3, 1958, secured and went into possession of a General Petroleum service station in Fresno in partnership with another (R. 86, 321). During the period of his operation of the Union station, he showed average net earnings of $453.03 per month (R. 320, 322). During the first 13 months of operation of the General Petroleum station (up to the time of his deposition) he sold a greater monthly gallonage and showed

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other reasons we did not renew the lease. You said it would simplify the presentation of the case and therefore in the brief we have filed we have said for the purposes of this case we will now take the position we did not give him a new lease because he violated the consignment agreement. It is a conceded fact in the case that he did violate the consignment agreement because he refused to charge the prices which his principal, the Union Oil Company, prescribed for him to charge." (R. 409)

16. His brief (at p. 64) seems to suggest that for breach of a valid term of the agreement, Union's only remedy was to sue Simpson for damages, and that it had no right to refuse to enter into new contracts with him. Common sense would be startled to learn that there was such a rule of law.

an average net profit of $1,017.52 per month (R. 320, 323), or a profit to him of over $500 per month.

F. The provisions of the Consignment Agreement.

Since the core of this case is the consignment agreement, we state its terms more fully.

Denominating Union as Consignor and Simpson as Consignee, the consignment agreement provided that Union would deliver to Simpson such quantities of its branded gasoline as the parties might from time to time mutually agree upon (¶ "First", R. 95). It did *not* bind Simpson to take any gasoline at all from Union. It did not preclude him from buying or receiving gasoline from others and selling it. It merely specified the terms and the basis on which Union would supply and on which he would handle such gasoline as he saw fit to receive from it and it saw fit to deliver to him.[17]

The terms of the arrangement were that title to all gasolines delivered would remain in Union until sold by Simpson (¶ "Fourth", R. 100), and that Simpson would sell "Consignor's [i.e., Union's] gasolines" at prices authorized by it (¶ "Second (2)", R. 95) in return for which Union would pay Simpson a commission computed according to a certain formula (¶ "Third (2)", R. 99). Consistent with the fact that Union retained title, it was specified that Union would pay all property taxes on all gasoline in Simpson's possession (¶ "Third (3)", R. 100) and would stand all loss and damage resulting from fire, explosion (not caused by Simpson's negligence) as well as from earthquake, lightning, or flood (¶ "Second (6)", R. 97-98).

17. Paragtaph First of the Agreement reads (R. 95):

"First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasoline as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at 4010 East Ventura Avenue, Fresno, California, on the terms and conditions hereinafter set forth."

Simpson was not obligated to pay for the gasoline but only to account for the proceeds when received (¶ "Second (7) and (8)", R. 98).[18]

Consistent with the fact of his agency, the consignee received a guaranteed commission. The basic commission was 1½¢ per gallon more than the amount by which the price at which Union authorized the consignee to sell (called the "authorized retail price") exceeded a reference figure called the "tank wagon price" (R. 99). But a minimum commission was guaranteed in two ways (¶ "Third (2)(a)(b)(c)", R. 99, 100):

1. When the price at which the consignee was authorized to sell fell to a specified base line, the commission did not continue to decline by the full amount of any further decline in the retail price but only by one-half of any further decline. Shortly before Simpson ceased to be a consignee, this was liberalized so that as the authorized retail price fell below a specified base line the consignee's commission declined by only 20% of that decline, and as the authorized retail price rose above the base line the commission increased by 80% of the excess (R. 281, 282).

18. His brief in this Court, (pp. 21, 63) contains the curious statement that the consignee paid Union for gasoline at the time of delivery. This is not so and is directly contrary to the record cited in support (R. 170-171, 80). When a gasoline tank was depleted and Union refilled it, consignee accounted for the proceeds of the gasoline that had theretofore been sold and was being replaced. Counsel would have it that this was payment for the gasoline newly delivered, but this contention confronts him with the oddity that there would be no accounting for the gasoline theretofore sold, and counsel hastens to argue (Br. 21) that "The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied". The tanks on the premises held 13,050 gallons (R. 20), which would cost a dealer purchasing it over $3000. Simpson's assertion amounts to a statement that Union sold him this amount of gasoline in May 1956 and let two years elapse without seeking or obtaining payment. No such queer gap exists if the payments are not distorted but are treated just as the contract provides, as an accounting of proceeds for gasoline after sale by the consignee. Moreover, Simpson testified that he never bought gasoline from Union (R. 311).

2. It was further provided that "in no event shall said commissions be less than $.0595 [5.95¢] for each gallon of 7600 Gasoline and $0.575 [5.75¢] for each gallon of Royal 76 Gasoline" (R. 100). In September 1956 this was increased at Simpson's request (R. 312) to 6.6¢ per gallon of regular and 7.1¢ per gallon of premium (R. 103, 104). Simpson's brief states (p. 19) that in February 1958 Union decided to drop the guaranteed minimum from the contract.[19] This relates, however, to the second type of guaranty; moreover, it does not concern him because the new policy went into effect after he ceased to be a consignee in May, 1958. A change in agreed commission could not be effected with any current consignee without his consent until the term of his consignment agreement expired. While the new commission terms were to be written into new consignment agreements, it was stated that "minimum commissions will remain as at present for an indeterminate period of time" as to all consignees, until all old agreements ran out or were changed by mutual consent, and it was hoped that the new policy would become effective by April 1959 (R. 77, 285, 286).

Further discussion of the terms of the consignment agreement will be found in the Argument at pp. 51-58, infra.

G. The facts relative to other matters referred to in petitioner's brief.

Several other subjects are referred to in Simpson's brief, it seems to us largely, if not wholly, by way of epithet without logical pertinence to any relevant issue. We therefore state the facts about them here, leaving discussion to the Argument.

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19. Simpson's brief erroneously states (Br. 19) that there was a change in February 1958 and another (Br. 20) in April. The documents of February and April refer to the same change, those of February announcing it, and those of April giving explanation of certain points.

1. REFERENCES TO MONOPOLIZATION.

While the complaint refers to Section 2 of the Sherman Act and Simpson's brief speaks of "monopolization", the claim was withdrawn in the District Court. At the first pre-trial conference, Simpson's counsel admitted that his claim of monopolization "is the weakest part" of his case (R. 382). At the next pre-trial conference, the following colloquy occurred (R. 396-8):

"The Court: A few weeks ago I thought we had the monopoly question pretty well disposed of.

"Mr. Keith: Yes; *we do have monopoly disposed of. Monopoly as such is out of the case.* * *

* * *

"Mr. Keith: Well, *I will limit the charge of monopolization to what I just said. In other words, it is another choice of findings as to the consignment agreement, if you so want me to.*

"Mr. Lasky: * * * Let me see if I understand. * * *

"You do not contend in this case that there was a monopoly by the defendant, Union, and your contention with respect to monopolization is merely that by virtue of owning or holding leasehold interests in a certain number of service station sites and leasing them to people with whom the company also enters into consignment agreements, the company is guilty of attempted monopolization. Now, that's the contention?

"Mr. Keith: Consignment agreements which control prices which allow the company to fix prices.

"Mr. Lasky: I understand. You are talking about these consignment agreements?

"Mr. Keith: These consignment agreements. Plus interfering with sales of property and leasehold interests.

"Mr. Lasky: Well, now, you see, there again, now we get off the beam. We don't interfere with anybody. We give them a one-year lease. When the lease is over if we don't renew it, what does the man have to sell?

"Counsel has his argument, but—well, I understand his argument."

Thus the term "monopolization", as used by Simpson, does not relate to any *additional factual* element by which it is sought to make illegal what would otherwise be legal. It is simply a characterization applied to the consignment arrangement and Union's refusal to give a new lease to a violator.

Thereafter Simpson filed his "Pretrial Statement for Pretrial Ruling" (R. 199), which was to supersede his Amended Complaint (R. 399-406). *That document nowhere uses the words or charges "monopoly" or "monopolization".* Still later, at the hearing of February 11, 1960, where the District Court sought to pinpoint the issues, Simpson's counsel nowhere spoke of "monopoly" or monopolization" (R. 407-435).

As noted in *United States v. Standard Oil Company of California*, 1958 Trade Cas. ¶ 69,212 at p. 74,760, there were approximately 36,000 service stations on the West Coast. About 21,000 were either owned by dealers themselves or leased by them from third persons other than any of the seven defendants in that case of which Union was but one. The total number of retail outlets selling Union gasoline was about 3600 on the West Coast (R. 332).

In California about 2377 service stations sold Union's gasoline, but in only 1335 did Union have any property interest by fee or lease. About 21,000 other stations sold products supplied by Standard Oil Company of California, The Texas Company, Tidewater Oil Company, Shell Oil Company, Richfield Oil Corporation, General Petroleum Co. (Socony Mobil Oil), Wilshire Oil Company, Hancock Oil Company, Mohawk Oil Company, Douglas Oil Company, Bankline Oil Co., Caminol Co., Century Oil Co., Fletcher Oil Co., Newhall Refining Co., Sunland Refining Co. and many others (R. 38, 113). Union stations sold only about 11.5% of the total gasoline sold through service stations in California (R. 38).

There were at least 246 service stations in Fresno, California (the location of the station leased to Simpson), of which only 26 were selling Union gasoline, all in competition with stations selling the products of the various companies named above (R. 15-17, 113).

2. REFERENCES TO COERCION.

"Coercion" is a word bandied about in Simpson's brief. At pre-trial the following colloquy occurred (R. 379-380):

> "Mr. Lasky [Union's counsel]: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products[19a] the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.
>
> "The Court: That is precisely what you mean by the word 'compel'?
>
> "Mr. Keith: *This statement is correct.*
>
> "The Court: And to the extent that that may be regarded as coercion, you will stipulate to that, is that right, Mr. Lasky?
>
> "Mr. Lasky: Why, yes. I don't stipulate it is coercion, but I say these are the facts.
>
> "The Court: If that constitutes coercion—
>
> "Mr. Lasky: Then we coerced him."

Thus the claimed "coercion" is no more than the fact that Union would deal with Simpson only on a consignment basis. This is further illustrated by the following subsequent colloquy (R. 423, 425):

19a. The word "and" improperly appeared here in the transcript.

"The Court: Where you enter into an agreement to take goods on consignment, you are under compulsion in the sense that you are using the term: That if you want to do business with the consignor you take the merchandise on his terms and that is the compulsion as I see it, that you are talking about.

"Mr. Keith: No.

"The Court: There is no compulsion or coercion, however, to take the agreement or operate under it?

"Mr. Keith: Well, in this particular situation—let's address ourselves to the facts here—* * * Mr. Simpson had an unfortunate highway accident. He had a few beers before the accident * * * and the next thing he knew he was no longer with Union Oil Company. But they appreciated the plaintiff and wanted him to have something from the company so they said he could have his pick of any Union Oil station in the State of California that was open. * * *
* * *

"The Court: What he had was an offer by the company to take whatever station he wanted to if he wanted it.

"Mr. Keith: Yes.

"The Court: And if he didn't want to take it he didn't have to.

"Mr. Keith: All right; but he was compelled, in order to lease that station, to take this consignment agreement—in order to lease that station.

"The Court: It is the word 'compelled' that bothers me a little bit. * * *
* * *

"The Court: How is it any different from the compulsion that is imposed upon a tenant who wants to rent an apartment and takes it on the conditions imposed by the landlord?

"Mr. Keith: It is just in this peculiar circumstance: He was a Union Oil man and he happened to have a good business opportunity, it is just one of those circumstances: He had a good opportunity with the defendant.

"The Court: If they wanted to give it to him."

3. REFERENCES TO EXCLUSIVE DEALING.

Simpson's brief speaks of "exclusive dealing" as demanded by Union of its dealers. The issue is spurious, since Simpson claimed no damage as flowing from any requirement of exclusive dealing (pp. 9-11, supra and p. 68, infra), and the charge is false. The facts are these:

"No lease or contract between Union and plaintiff required him to buy any products of the Union Oil Company of California or not to handle or sell products made by anyone else" (R. 38). There is nothing in the lease (R. 19-36). As we have seen (p. 13 supra), the consignment agreement did not even oblige Simpson to take a minimum quantity of gasoline from Union, much less require him to deal in its gasoline exclusively.

When the District Court brought the issues to a stipulated focus in February 1960, this occurred:

> "The Court: Where do you find [an] exclusive dealing requirement[20] in the facts of this case, and if it were an issue, where would you find your evidence to support that contention?
>
> "Mr. Keith: I was just going to say this, your Honor: I have interrogatories addressed to this point. * * *
>
> * * *
>
> "* * * On this question of exclusive dealing, it is going to be in these last interrogatories that are due now so that I can dispose of that.
>
> "The Court: *You mean it will either be admitted in the interrogatories or you will have no additional evidence to establish exclusive dealing?*
>
> "Mr. Keith: * * * *for the purpose of the disposal of this case I would submit it on the answers to the interrogatories addressed to them.*
>
> "The Court: All right.
>
> "Mr. Lasky: That is very well indeed." (R. 432)
>
> * * *

20. The reporter transcribed this as "Where do you find exclusive dealing a requirement", etc. The slight change above is obviously correct.

"Mr. Keith: Your Honor, I asked them to say if they knew of any station where there was a split-pump situation, and Mr. Haas indicated at the pretrial there weren't very many." (R. 434)

Thus Simpson stipulated that he would rest his claim of agreements between Union and its dealers that they would handle its gasoline exclusively on whatever answer he received to an interrogatory on how many "split-pump" accounts Union served. A "split-pump" dealer is one who sells the gasoline of more than one supplier. The answer was "one" (R. 336). This is the sum total of the "evidence". Its lack of any significance is discussed in the argument (pp. 70, 71, infra).

Despite his statement in the District Court that he rested solely on the answer to the one interrogatory, Simpson's brief now makes several statements on the subject, which are plainly incorrect. He states (Br. 18) that the written consignment agreement provides that the "dealer is to maintain the trademarks of Union on his pumps and other facilities through which gasolines are dispensed (R. 95)." The cited clause of the agreement (¶ "Second (1)", R. 95") did not so provide. What it provided was that the consignee will handle and sell "all *gasolines delivered hereunder* under Consignor's brands, trade-marks and names * * * and will maintain said brands, trade-marks and names on pumps and other facilities through which *said gasolines* are dispensed". This merely required that if he obtained Union's gasoline for sale, it had to be sold under Union's brands, and that the pumps and facilities through which Union's product was sold had to bear its brand. Exactly this is required by the California Petroleum Labeling Act, discussed at p. 23, infra.

Simpson's brief further asserts (p. 18) that "The dealer could not, under respondent's consignment agreement, repaint the whole station and dispense another company's gasolines at his station without ouster", and (Br. 26) he repeats that "Dealers were not

allowed, under the consignment agreement program, to handle the gasoline products of other companies and repaint the stations". There is no such provision in the consignment agreement or in the lease, *and no truth to these statements*. The record reference cited in support of them is R. 434-435. That is a statement made by Union's counsel[21] in argument that in order to handle gasolines of others, "You would have to repaint the whole thing"; but this was counsel's summation of an argument just made by him at length 4 pages earlier about the requirements of the California petroleum labeling statute, as follows (R. 430):

> "There is nothing in the consignment contract that requires the plaintiff to take any quantity of gasoline from us or to handle any quantity. What it says is that we will supply to him on consignment and he will handle on consignment as a consignee such amounts of gasoline as the parties from time to time shall determine. That is all it says.
>
> "Next there is the affidavit of Mr. Rath, not contradicted, that we never required the man to handle no one else's products.
>
> "Now this must be read in conjunction with the requirement of California State law. It is illegal in California for anybody to sell gasoline other than the brand that goes under the color of the pumps through which it comes and under the color of the station, or at least under the color of the pumps. This is the State law which prevents deceit.
>
> "This means that any consignee who has taken our station lease with our colors on it and our pumps, if he wants to sell someone else's gasoline would have to put in separate tanks and separate pumps bearing the proper colors of whatever brand he is selling.
>
> "Now very few people, although they have the right to do so, see any economic sense in maintaining two separate pumps and two separate tanks.

21. The writer of this brief.

"I could call those State Code citations to your Honor's attention, but they are in the Busjness and Professions Code."

These state statutes are part of the factual matrix and are therefore appropriately summarized here (and fully quoted in Appendix 1): Every gasoline pump and underground tank must be plainly labeled with the brand, trademark or trade name of the gasoline (Cal. Bus. & Prof. Code § 20840), no other brand of gasoline may be placed in the underground tank (§ 20849), no pump may be attached to a tank containing a brand different from that appearing on the pump (§ 20850), gasoline other than the brand appearing on the pump may not be delivered from it (§ 20851). This legislation was enacted to protect the public from fraud, deceit and substitution, *Serve Yourself Gas etc. Ass'n v. Brock*, 39 C.2d 813, 821, 249 P.2d 545 (1952).

H. The two major issues in the case.

The first issue is whether by anything it did Union violated the Sherman Act.

But assuming *arguendo* that it did is not an end of the matter of liability. The agreements between the parties terminated in May 1958. This is neither a criminal suit to punish Union for an alleged past violation of law nor a suit in equity by the Attorney General to enjoin the future practice of conduct thought to be illegal. "Plaintiffs are not the champions of any rights except their own"[22] and a private plaintiff has no standing to call for antitrust adjudications in the abstract (See cases cited at pp. 80, 81, infra). He can recover only if he has suffered actionable damage from past acts.

A second major issue, therefore, is whether Simpson suffered actionable damage. This is not a question of amount, for amount

22. Cardozo, J., in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1936).

is not determinable on summary judgment, but whether any damage has been caused by any actionable conduct of Union—i.e., whether any conduct of Union assumed, *arguendo*, to be illegal was the cause of any damage.

The District Court held both (1) that Union did not violate the law, and (2) that Simpson suffered no actionable damage (R. 347-360).

In affirming the judgment the Court of Appeals "refrain[ed] from deciding" any question of violation "because it appears clearly on the record that Simpson suffered no actionable damage" (R. 565).

We shall discuss both issues, and first that of legality of Union's conduct, for we wish no unargued assumptions of illegality to color the case.

Summary of the Argument

I. With Respect to Ripeness of the Case for Summary Judgment for Respondent.

The case took the course urged by the Judicial Conference's *Handbook of Recommended Procedure for the Trial of Protracted Cases*. Discovery proceeded under the court's close supervision; there were numerous pre-trial conferences, wherein plaintiff had the utmost opportunity to formulate his contentions, the issues were focused, and in order to eliminate factual issues Union stipulated to facts claimed by Simpson. Not until Simpson assured the court that he had exhausted discovery, conceded that no questions of fact on the issue of violation of law remained, and himself moved for a summary judgment on liability, did the court grant Union's motion. (Pp. 32 to 38, infra)

II. With Respect to Whether Union Did Anything Violative of the Sherman Act.

1. Taken as a whole the case is this: Union, one of innumerable refiners of gasoline, appointed agents to sell its gasoline at its prices, leased its realty to its agents, and when one agent's lease expired, refused to give him a new lease because he had been a faithless agent. The Sherman Act has nothing to do with this set of facts. (Pp. 79, 80, infra)

2. The use of consignment is ancient, commonplace and widespread. A consignee is an agent, paid by commission. It is no more illegal for a vendor to fix the price at which it sells its own property through a commission-paid agent than through a wage-paid employee. This Court, in *United States v. General Electric Co.*, 272 U.S. 476 (1926), and in other cases, the courts of California, a variety of other courts, and the proposed Uniform State Antitrust Act have all therefore concurred that consignment is not illegal under the antitrust laws as price fixing. Union's consignment system was examined and recognized as legal in the Consent Decree in the West Coast Oil case, *United States v. Standard Oil Company of California*, 1958 Trade Cas. ¶ 69,212; 1959 Trade Cas. ¶ 69,399. As *General Electric* held, the fact that a principal uses many consignees is irrelevant to the question of legality. Cases on resale price maintenance agreements are irrelevant, since there was no sale by Union to a dealer and resale by him but a sale by Union to the consumer through the consignee. (Pp. 38 to 51, infra)

3. The terms of the Retail Dealer Consignment Agreement were plainly terms of consignment and not of sale. This very agreement has been described both by a California court and by a federal court in the West Coast Oil case, supra, as an agency contract. Its terms are similar to or identical with those repeatedly

described as consignment in *General Electric*, supra, and in other decisions of this and other courts. Under it Union retained title to the product and paid all personal property taxes on it, and Simpson assumed none of the risks and burdens of ownership, was not obligated to pay for the product, did not take risks of resale but merely accounted for the proceeds if and when received, assumed no risk of price declines, and was paid a guaranteed commission. (Pp. 51 to 58, infra)

4. Moreover, to assert that the agreement was not consignment but sale is footless, because, if a sale, the price provision was legal as a valid Fair Trade clause under the California Fair Trade Act and the federal McGuire Act. (Pp. 58 to 61, infra)

5. Despite their use as epithets in Simpson's brief, "monopolization", "coercion" and "exclusive dealing" are not issues in this case. In the District Court Simpson disavowed any claim of monopolization, as well he had to. Union was but one of over 16 refiners selling gasoline on the West Coast. Out of 36,000 service stations on the West Coast, only 3600 sold Union gasoline; out of 23,000 in California, only 2377 sold Union gasoline; of 246 in Fresno, only 27 did so. In only 1355 stations in California did Union have any proprietary interest. It would thus be absurd to say that Union monopolized either the gasoline business or service station sites. Indeed, by "monopolization" Simpson means only that Union attempted to control the sale of its own brand of gasoline. But the power one has over its own trademarked product is not the power that makes an illegal monopoly. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956). Simpson concedes that if Union operated the same stations by wage-paid employees, selling the same gallonage, instead of selling through consignees, it would not be in violation of either Section 1 or Section 2 of the Sher-

man Act. Use of consignee agents does not convert legality into illegality. (Pp. 64 to 68, infra)

6. The claim of "exclusive dealing" is sham because (1) Simpson has claimed no damage from any supposed exclusive dealing requirement, (2) it would have been entirely legal for Union, as a consignor, to require a consignee to handle the principal's product alone, *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568 (1923), and for it, as a lessor, to limit the lessee's use of tanks and pumps to the lessor's product, *Federal Trade Commission v. Sinclair*, 261 U.S. 463 (1926), but (3) Union did neither. The lease contains no provisions on the subject. The consignment agreement not only did not preclude the consignee from handling the gasoline of any other supplier, it did not require him to take any gasoline from Union but merely required that such gasoline as he chose to receive from Union would be handled on consignment. Union further showed, under oath, that there was no other agreement, this was not denied by Simpson, and he explicitly rested his claim of exclusive dealing on the bare and simple fact that only one Union station was a "split-pump" station. But this is no evidence at all of any exclusive dealing requirement imposed by Union, for "split-pump" stations are unacceptable to the public and are recognized by service station operators as uneconomical to operate, particularly since state law requires separate tanks and pumps for every brand. (Pp. 68 to 72, infra)

7. By "coercion" Simpson meant only that he wished to occupy Union's property and sell its gasoline, knew that the only basis on which it would merchandise its gasoline at service stations which it owned or on which it had a lease was to sell it directly by the agency of consignees, and he accepted these terms in order to obtain a lease, because it would lease to him on no other basis. This is not "coercion." (Pp. 72 to 74, infra)

8. There was no illegality in the conjunction of lease and consignment, and the Consent Decree in the West Coast Oil case, supra, so recognized. Simpson's citations on tying agreements are not in point, for Union nowhere and nohow conditioned the sale or lease of any commodity, realty or service on the purchase or lease of any other. Its unwillingness to lease its realty to one who would not execute a consignment agreement was not a "tie-in", for, as noted above, the consignment agreement neither required the consignee to take any gasoline from Union nor precluded it from handling gasoline of others. Similarly, Union's refusal to give a new lease to one who had violated a consignment agreement in the past was not a tying agreement or any agreement at all. Reading of *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal.), a Section 3 Clayton Act case on which Simpson relies so much, shows that it lends no support for his contention that the conjunction of a one-year lease and consignment was illegal. (Pp. 75 to 79, infra)

III. With Respect to Whether Simpson Suffered Any Actionable Damage.

A private litigant must show more than that there was a violation of the antitrust laws. Clayton Act § 4 requires that the particular violation be the legal cause of the particular claimed damage. (Pp. 80, 81)

1. The claim of $1,000 damage, said to flow from "inability" to charge what he wished for gasoline, fails because Simpson was able to charge what he wished, as demonstrated by the fact that he did so when it suited him. Moreover, if the consignment agreement was illegal, Simpson was free to ignore it, and if he charged for the gasoline a price different from what he preferred, his conduct was his own. His argument, whether sound or unsound, that doctrines of *pari delicto* or consent are in-

applicable in antitrust cases is beside the point. Those doctrines, where applicable, defeat recovery for damages inflicted *upon* a plaintiff *by* a defendant. Here recovery fails because the alleged damage was not inflicted on Simpson by Union, but the cause was Simpson's own act in charging what prices he charged. No case ever held that where B performs a given conduct he then can recover damages from A therefor because he had agreed with A so to conduct himself by an agreement illegal under the Sherman Act or for any other reason. He who *does* an act is not wronged by it. The claim further fails because, while a holding that the consignment agreement was illegal would outlaw the agreement, it does not permit a court to create a different contract to put in its place. In consequence, the gasoline entrusted to Simpson by Union would merely have been in his possession as its gasoline without any right of disposition other than to return it. Even treating the agreement as one of sale to Simpson would not permit recovery of damages, because every element essential to determine *fact* of damage would be pure conjecture. While leeway is given a plaintiff in an antitrust suit in proving *amount* of damage, no room for speculation is permitted in establishing the *fact* of damages. (Pp. 81 to 88, infra)

2. The claim of $150,000 fails because any such "damage" was not caused by the consignment agreement and lease, either or both, however illegal they may be assumed to be, but by Union's refusal to give Simpson a new lease. Since a plaintiff cannot recover under the antitrust laws except for deprivation of a legal right, *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156 (1922), Simpson cannot recover for Union's refusal to give him a new lease of its property unless he had a legal right to a new lease. State law governs the right to an estate in realty, and the judgment in Union's unlawful detainer action against Simpson

in a California court is *res judicata* that under state law Simpson had no right to further tenure or possession. Federal antitrust law imposed no duty on Union to do what the state law did not require, viz., lease to Simpson for a further term. The fact that Union's reason for refusing to give Simpson a new lease was his past unwillingness to follow price direction is not relevant. The right to select whom one will deal with is so fundamental in our system that, absent monopoly, one may unilaterally refuse to deal with another for any reason whatever, including failure of the other to follow a course of conduct which it would be illegal to bind him to do by a mutual agreement. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960). What the Sherman Act forbids are agreements and conspiracies, but the refusal of one party to deal further with another because the latter has refused to accede to the former's desires as to his conduct demonstrates absence of agreement. Consequently, innumerable decisions deny recovery for the refusal to deal. Otherwise manufacturers would become public utilities, and Congress has declined in the past to make them so. This being true of a refusal to sell, *a fortiori* one cannot be compelled to lease property to another whatever his reasons for the refusal.

Because the Court of Appeals suggested, although it did not hold, that there might be a distinction between the case of one who had been a Union lessee before it adopted the consignment method of marketing and that of Simpson who had never theretofore been a lessee and became one knowing that he had to be a consignee, Simpson debates the question whether "consent" will bar a private suit for damage under the antitrust laws. But no such general question is involved in this case or the reasoning of the Court of Appeals, since the lease and consignment, to which he consented, did not cause his damage. During their exist-

ence he could have repudiated them, if they were illegal; but, repudiating them, he could not continue to exercise rights he had acquired solely from them. *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951), cer. den. 341 U.S. 935. It would be one thing to say that consent does not bar damage inflicted, it would be quite another to say that while successfully repudiating an arrangement for illegality one can nevertheless keep it alive for its specified duration for such advantages as it offers him. But Simpson's case here is even weaker than that. Here the duration of the lease and consignment ended by their terms and the efflux of time; Simpson cannot claim a right to a *new* lease by virtue of the fact that for a period in the past he had been a Union dealer solely by force of a now expired lease and agreement which he now claims were illegal. If in 1956, before Simpson ever became a lessee, he had declined to accept a consignment arrangement, plainly he could not have compelled Union to lease its property to him without a consignment agreement, or pay him damages, on any theory that consignment was illegal. The fact that he did enter into the consignment agreement and have a lease for a space of time did not enlarge his rights and entitle him to still further leases on other and different terms. (Pp. 89 to 101, infra)

IV. With Respect to Interstate Commerce.

No summary under this head seems needed since the entire argument appears in slightly over one page. (p. 102, infra)

Argument

I.

PRELIMINARY: RIPENESS OF THE CASE FOR SUMMARY JUDGMENT FOR RESPONDENT

The case took the course urged by the best thought on the handling of antitrust cases. It followed the admonitions of the *Prettyman Report* (13 F.R.D. 62) and of the Judicial Conference's *Handbook of Recommended Procedure for the Trial of Protracted Cases* adopted in March 1960 (25 F.R.D. 351). Discovery proceedings were had under the closest supervision of the court, and there were numerous pre-trial conferences resulting in stipulations. And not until Simpson assured the court that he had exhausted discovery, conceded that there were no questions of fact on the issue of violation of law, and himself moved for a summary judgment on liability, did the court grant Union's motion for a summary judgment. Although, as the Court of Appeals observed (R. 569), Simpson's contentions vacillated, nevertheless the issues of liability were finally focussed and stated to be issues of law, involving no issue of fact. His brief in this Court submits (p. 57) that "the determination of the issue of violation of the Sherman Act to the injury of petitioner * * * it is respectfully submitted, should be made in summary judgment."

While this Court has observed, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that summary judgment is not usually appropriate on issues of motive, intent and conspiracy, it has also said that, with that caution, "summary judgments have a place in the antitrust field, as elsewhere", *The White Motor Company v. United States*, 372 U.S. 253 (1963). Here no conspiracy is charged (see p. 4), and on the issues of motive and purpose Union stipulated to the satisfaction of Simpson's counsel in order to eliminate quibble about possible issues of fact.

Simpson's counsel said at the first pre-trial conference (R. 378):

> "I say there are two issues in this case [on] the issue of liability: No. 1, the consignment agreement is unlawful on its face as a matter of law. And this, of course, I would have no objection to presenting in a pretrial form of partial summary judgment.
>
> "On the issue of whether or not the consignment agreement is coerced on unwilling lessees, this is a factual question * * *."

Thus Simpson submitted the case on the basis that there were just *two* issues as respects liability:

1. Whether the consignment agreement was unlawful on its face. This, he conceded, was a pure issue of law.

2. Whether the consignment agreement was coerced on unwilling lessees. This he first said involved a question of fact. But then occurred the colloquy (R. 379-80) quoted at pages 18, 19, supra. Simpson's counsel stated what factual situation he meant by the claim of "coercion", and Union then stipulated, for the purpose of its motion for summary judgment, that such were the facts. Consequently, at a following hearing, Simpson's counsel conceded that no issue of fact existed on the second question of liability. The District Court asked counsel to specify, in view of Union's stipulations:

> "just exactly what in the way of factual issue other than, perhaps the issue of damages, is to be presented to a jury in this case" (R. 412, 413).

In extensive discussion (R. 414-29) Simpson injected a new issue, about "exclusive dealing", but conceded that there was no issue of fact on the two contentions referred to above, legality of consignment and "coercion".

> "The Court: Those are the first two things you had in mind, Mr. Keith, and *I think they are both conceded in sufficiently definite form to eliminate those as issues.*
>
> "Mr. Keith: *Yes.*

"The Court: All right. Then we get to the third question of exclusive dealings.

"Let's hear what Mr. Lasky has to say." (R. 429)

Union replied that this

"would be an improper issue to let go to the jury for the reason that plaintiff has never claimed any damage flowing from an alleged exclusive requirement" (R. 429),[23]

and the Court asked Simpson's counsel what evidence of an exclusive dealing requirement he intended to rely on. Counsel replied that he would rest entirely on the answer he would receive to one interrogatory about "split pumps".[24] Thus the issues about "exclusive dealing" are also pure issues of law, viz., is "exclusive dealing" a relevant inquiry at all, and, if it is, is the sole evidence Simpson relies on any evidence at all to go to a jury?

During this pre-trial conference, Simpson's counsel momentarily —*but only momentarily*—raised a contention he had disavowed from the outset. He repeated that he charged no conspiracy but first sought to limit this statement to conspiracy between Union and any competitive company (R. 393). The District Court then asked (R. 393):

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23. "* * * He has specified where he was damaged. He has not said that by being required to take our product instead of something else he has been damaged. He has never said he wanted to take anybody else's product and wasn't permitted to do so. He has not said that because he refused to handle our product exclusively, we terminated the lease. Pardon me, we never terminated the lease; we never cancelled. It expired of its own effect and we declined to renew.

"* * * He begged me, in effect, to stipulate that the reason we did not renew his lease was because he violated the consignment agreement by not observing the price schedule we placed for the sale of our gasoline, and on that urging I so stated for the purpose of this case.

"Now, where does this exclusive requirement element get into this case?" (R. 431)

24. The colloquy on this is quoted at pp. 20, 21, *supra*.

"The Court: What is your contention in this case, Mr. Keith? Who are they supposed to have conspired with if not their competitors?"

Simpson's reply was that he did not raise any *factual issue at all* about conspiracy, but a legal argument, and finally he withdrew that argument as well. We quote:

"Mr. Keith: This is a question for the Court, your Honor. The Supreme Court in the Dr. Miles case concluded that Dr. Miles had forced, in effect, a conspiracy between all his retailers. Now, I don't want to take that issue from the Court if the Court wants to so find.

"It's not a conspiracy between competitors. But this is a legal issue, I don't want to be precluded from any determination the Court might want to find at any proceeding in this case. (R. 393-94)

* * *

"The Court (Interposing): * * * The last time we were here, Mr. Keith, you were quite certain that the face of the consignment agreement was the crux of your case.

"* * * Now, on the first possibility of an understanding of the theory on which you are going ahead we find some sort of a nebulous thought that perhaps there is a conspiracy between the dealers, the oil company and some other unidentified, noncompetitive groups.

"Mr. Keith: Well, of course, your Honor, I think this is a legal conclusion that is being asked. *This is not a fact at all.*

* * *

"The Court: What is your position in this case?

* * *

"Mr. Keith: Well, as I say, *the complaint does not charge conspiracy.* It says these contracts are in restraint of trade. If the Court desires to eliminate this issue, *I will eliminate the issue. The central issue here is contracts in restraint of trade and monopolization.*"[25] (R. 393-395)

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25. As we have seen (pp. 16, 17, supra), by "monopolization" he meant only a characterization of the consignment agreement and the leases.

Thus any claim of any kind of conspiracy was limited to one deducible, if at all, from the contracts themselves. In the words of the Court in *The White Motor Company v. United States*, 372 U.S. 253, 259, since "the gist of the case turns on documentary evidence", no trial is needed and summary judgment is proper. *Poller v. Columbia Broadcasting*, 368 U.S. 464, 467 (1962), quotes *Sartor v. Arkansas Natural Gas*, 321 U.S. 620, 627 (1944), for this Court's basic teaching on summary judgments: Litigants are not to be cut off from a right to jury trial *"if they really have issues to try"*. For this, *Sartor* invoked the analogy of the directed verdict. In *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2 Cir. 1945), cer. den. 325 U.S. 861, Clark, J. for the Court, affirming a summary judgment, said (p. 405):

> "Here the analogy suggested in *Sartor v. Arkansas Natural Gas Corporation* * * * of evidence which 'would require a directed verdict for the moving party' is useful. *But care should be taken to make the analogy as exact as circumstances permit; the ruling is to be made on the record the parties have actually presented, not on one potentially possible.* Hence the case here is as though defendant had offered plaintiff's admissions, and plaintiff had then rested, with no contradiction or rebuttal of any kind, and had made its own motion for a directed verdict or peremptory instruction."

(This is particularly apposite since Simpson did in fact move for summary judgment.) Thus, whether an issue of fact exists is not left to a champertous imagination but depends on what the parties in fact presented. This Court's 1963 amendments to Rule 56(e) of the Rules of Civil Procedure underscore the point. It added to that rule two sentences:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The reason for this addition to the rule, as stated in the Advisory Committee's notes to the proposed amendment in the *Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, was "to overcome a line of cases * * * which has impaired the utility of the summary judgment device."

As each issue is discussed in the pages to follow, it will be made clear that no factual issue on liability exists in the record. Indeed, we find nowhere in petitioner's brief any claim of a factual issue on liability. While his Question No. 4 (R. 3) refers to the right to a jury trial, and his brief concludes with a cursory paragraph (Br. 74-75) about it, he does not even there specify or identify any factual issue except "as to any consent of the petitioner to his causes of action here", whatever that means. To talk of right to jury trial is an emotional deflection. If there is a material issue of fact, a litigant is entitled to have it jury-tried; if there is not a material factual issue, there is nothing for a jury. *Marietta Page v. Tilford Work*, 290 F.2d 323, 324 (9 Cir. 1961), cer. den. 368 U.S. 875. Repeatedly the District Court inquired "just exactly" what "factual issue * * * is to be presented to a jury in this case", and was assured that there was none. For example, this colloquy occurred (R. 427):

"The Court: There are no more facts for you to develop, are there, except insofar as they relate to damages?

"Mr. Keith: From my point of view, not from the defendant's point of view. They are claiming there are all these facts on injury and damage. They say there is no dispute of the fact as to injury and damage. I say there is a dispute as to the fact unless—

"The Court: Only as to the amount of damages, because you say in the present posture of the case the injury is definitely established, and once the injury is established it

leaves only the question of damages in amount to be determined by a jury. Isn't that the only logical conclusion you can reach?

"Mr. Keith: You are right, your Honor, and if your Honor desires me to make a motion for summary judgment, I will * * *."

As the District Court said in its opinion (R. 347):

"Extensive pretrial proceedings before this court have eliminated all the factual disputes and defendant has stipulated to certain specific allegations of fact to facilitate disposition of this case on reciprocal motions for summary judgment."

II.

UNION DID NOTHING VIOLATIVE OF THE ANTITRUST LAWS

The basic ground on which it is claimed that Union's consignment method of marketing was illegal is that Union was guilty of "price-fixing" because it directed the price its consignee charged.

But if the service stations which sell Union's branded gasoline were operated by its wage-paid employees, no one would dream of contending that it was guilty of a price fixing violation of the antitrust law by setting a price at which its gasoline was sold at those stations. Simpson's counsel so conceded below.[26] And the Court will judicially notice that Standard Oil Company of California does exactly that in its Standard stations.[27] We think that the question

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26. "The Court: There is no argument about the proposition that if Union had operated this station or all of these stations directly through its own employees, they could fix any price they wanted to?

"Mr. Keith: No question about that." (R. 440)

27. In *United States v. Standard Oil Company of California, et al.*, 1958 Trade Cas. ¶ 69,212, p. 74,758 at 74,760 (S.D. Cal. 1958), the court noted that Standard "fixes the sales price of gasoline in these company-owned stations which, * * * for 1957, numbered 1156."

In *United States v. Standard Oil Company of California*, 78 F.Supp. 850, 854 (S.D. Cal. 1948), aff'd by this Court, 337 U.S. 293, it was noted:

"The Government does not question (indeed, it could not) the right of Standard Oil Company of California to operate its own stations and sell therein any product it manufactures or distributes."

of whether a consignment arrangement is illegal as price-fixing is nothing more than the question whether an owner of property, who may determine the price at which he sells it when sold by a wage-paid employee, is precluded from doing so when sold by an agent compensated on a commission basis.

In answering this question it is perfectly idle to cite cases, as Simpson does, for the principle that sellers may not conspire together to set their prices.[28] The present case involves no claim of a horizontal price-fixing agreement; that was made clear at the outset of the case (see p. 4, supra). It is also beside the mark to cite cases holding that, unless permitted by fair trade laws, one may not enter into an agreement with a purchaser fixing the prices at which he will resell the product which he has bought and thus owns.[29]

No more is Simpson aided by cases involving a combination of these situations, i.e., a horizontal arrangement to fix resale prices.[30]

The present case is like none of the foregoing. This is a case of a vendor determining the price at which it sells its own property. Union did not sell gasoline to Simpson and then seek to fix his resale price. He was not a purchaser from Union but its agent for the sale of its property.

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28. Such are the following cases cited by Simpson: *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

29. Such are *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *The White Motor Company v. United States*, 372 U.S. 253 (1963); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Strauss v. Victor Talking Machine Co.*, 243 U.S. 490 (1917); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

30. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

A. Consignment Does Not Violate the Sherman Act.

The contract was made in California. There (as elsewhere) the terms "consignee", "factor", and "commission merchant" are synonymous, and a factor is one who, in the exercise of an independent calling and not as an employee, sells another's goods *as the other's agent. Cass v. Rochester*, 174 Cal. 358, 361, 163 Pac. 212, 213 (1917). Factoring or consignment is not a lawyer's manipulation of concepts but an ancient part of the common law;[31] consignment contracts providing that the consignee shall sell goods on commission at prices stipulated by the consignor are widespread in business. They have been commonplace in the petroleum business for decades, e.g., *Gulf Refining Co. v. Wilkinson*, 96 Fla. 664, 114 So. 503 (1927); *Texas Co. v. Higgins*, 118 F.2d 636 (2 Cir. 1941) (Learned Hand, J.), as they have been and are in many other lines, *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Ludvigh v. American Woolen Co.*, 231 U.S. 522 (1913); *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917); *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1956), cer. den. 350 U.S. 988.

In *United States v. General Electric Co.*, 272 U.S. 476 (1926), this Court directly held that consignment is not illegal under the antitrust laws as a price-fixing arrangement. There General Electric had 400 consignees in one class and 21,000 in another (p. 483). As there said (pp. 483-485):

> "* * * The question is whether, in view of the arrangements, made by the Company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public,—such persons are to be treated as agents, or as owners of the lamps consigned to them under such contracts. * * *

31. 1 Blackstone Commentaries 427 (Lewis's edition).

"* * * The circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior arrangement had bought the lamps, and sold them as their owners, did not prevent a change in their relation to the company. * * *

"* * * The validity of the Electric Company's scheme of distribution of its electric lamps turns, therefore, on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. *The distinction in law and fact between an agency and a sale is clear.*"

In a *First Tentative Draft of a Proposed Uniform State Antitrust Act* under consideration by the National Conference of Commissioners on Uniform State Laws, prepared for it by the "Legislative Research Center, The University of Michigan Law School," and said basically to "follow[s] the federal antitrust laws", the following comment of the draftsmen appear under the definition in Section 1(2) of "contract, combination, or conspiracy":

"This definition is designed to include within the Act all collusive arrangements regardless of form, sale, contract to sell, purchase, contract to purchase, lease, contract to lease, license, contract to license, trust, common selling or purchasing agent, pool, or holding company. *Consignment transactions have not been included: a principal is at liberty to control the price and other terms upon which his agent may dispose of his commodities or services.*"[32]

California Civil Code § 2026 (adopted in 1872) provides that

"A factor is an *agent* who, in the pursuit of an independent calling, is employed by another to sell property *for him*, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

32. Set forth in 1963 Trade Cases ¶ 70,199.

Section 2027 provides:

> "A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him * * *."

Included in the "instructions of his principal" that a consignee must obey are those respecting the price at which the owner's goods are to be sold. *Bare v. Richman & Samuels, Inc.*, 60 C.A. 2d 413, 140 P.2d 895 (1943).

As recently as February 1963 it was definitively held that a gasoline consignment arrangement does not violate the California Antitrust Act, "for it was lawful for a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell the goods of the consignor." *Shasta Douglas Oil Co. v. Work*, 212 A.C.A. 640, 644,[33] 28 Cal. Rep. 190, 193 (hearing by California Supreme Court denied April 3, 1963). One of the cases cited in the opinion in the *Shasta Douglas* case in support of this statement is *Gonzales v. Derrington*, 10 Cal. Rep. 700, 717 (1961), which involved the nature of Union's consignment arrangement; there the court had held that Union's consignees are merely its agents.

Union's consignment system was also thoroughly examined in *United States v. Standard Oil Co. of California*, Civil No. 11584-C (S.D. Cal. 1958), the Government's antitrust suit against the seven largest West Coast oil companies which was pending from 1950 to 1959. After extensive pre-trial examination of the facts, the court there observed (1958 Trade Cas. ¶ 69,212, p. 74,758 at 74,760) that Union "places its gasoline on consignment" and "fixes the prices at which it should be sold", and thus, "title remains in Union until the gasoline is sold, and Union factors its gasoline at these stations." It then ruled that, regard-

33. The citation "A.C.A." is to Advance California Appellate Reports. The decision will in due course appear in 212 C.A.2d.

less of the outcome of a trial, it would not compel Union to terminate its consignment system or compel Standard Oil Company of California to cease selling through its employee-operated stations. Thereafter Union and other defendants in that case entered into a Consent Decree on June 19, 1959 (reported in full in *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399, p. 75,522, et seq.) which specifically recognizes consignment agreements with service station dealers. By it the consenting defendants were required to give three year supply agreements to dealers who wished them,[34] and that requirement is satisfied by the supplier's entering into a consignment contract with the dealer whereby the dealer sells gasoline at prices set by the supplier. While this decree is not *res judicata* as respects Simpson, since he was not a party to the case, it is significant, because the Antitrust Division of the Department of Justice and the United States District Court, in a suit designed to remedy supposed evils in the oil industry, would never have provided for retail consignment agreements if those agreements were thought to be proscribed by the Sherman Act.[35]

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34. Simpson had ceased to be a dealer over a year before this Consent Decree went into effect.

35. Paragraph XII(A) of the decree requires each consenting defendant to the decree to offer a "supply agreement" to its "dealers". Paragraph II defines each of the terms. Paragraph II(o) provides that

> "'Supply agreement' shall mean an agreement of purchase and sale *or a consignment contract.*"

Paragraph II(d) provides that

> "'Dealer' shall mean any person who is engaged *as a consignee or reseller* in the business of selling gasoline at a place of business serving highway automotive vehicles of the general public * * *."

"Consignee", "consignment contract" and "reseller" are defined as follows in Paragraph II:

> "(b) 'Consignee' shall mean a person who, *in the pursuit of an independent calling* and not as an employee, is engaged by a consenting defendant *as its agent* to sell any of said defendant's refined petroleum products *for it and at a price designated by it*, and is

In *Standard Oil Co. v United States*, 337 U.S. 293 (1949), where this Court invalidated Standard of California's practice of selling to dealers under total requirements contracts, the Court's opinion observed that before Standard had adopted that method of marketing its method was to sell through independent service stations *under agency agreements*, and that if Standard's requirements purchase arrangements were declared invalid, it would probably either return to the agency arrangement or make further use of the method of operating stations by wage-paid employees. And it was recognized that either of these methods, so long as Standard did not reach the point of monopolization, would be legal.[36] And for that very reason Mr. Justice Douglas dissented

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vested by said defendant with possession or control of the product and authorized to receive payment from the purchaser."

"(c) 'Consignment contract' shall mean a written agreement by which a consenting defendant engages a person to act as its consignee."

"(n) 'Reseller' shall mean any person who buys a refined petroleum product for resale, insofar as said product is concerned. As to any refined petroleum product which such person may handle *under consignment contract* or other arrangement not involving a purchase and resale by him, he is not deemed to be a reseller."

Paragraph XII(F) refers to "commission rates" provided for in a supply agreement.

36. "Before 1934 Standard's sales of petroleum products through independent service stations were made pursuant to agency agreements, but in that year Standard adopted the first of its several requirements-purchase contract forms, and by 1938 requirements contracts had wholly superseded the agency method of distribution." (p. 296)

"Having adopted this standard of proof, the court excluded as immaterial testimony bearing on 'the economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and *which would prevail if the court declared the present arrangement [invalid]*' " (p. 298).

"Before the system of requirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course insofar as they resulted in a tendency to monopoly they might encounter the antimonopoly provisions of the Sherman Act." (p. 310)

from the decision. He felt that to outlaw total requirements contracts with vendees would lead Standard to bypass the middlemen by discontinuing selling *to* dealers and adopting a system of selling directly to the motorist *through its own employees or through consignees*, either of which would be legal (p. 320).

Prior to the *General Electric* case, in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), the case where the Court first held resale price maintenance agreements to be violative of the Sherman Act, the Court plainly recoginzed that this rule had no reference to one's rights to sell through consignees.[37] After the *Dr. Miles* case and before the *General Electric* case, the Fifth Circuit in *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 283 (1916), cer. den. 247 U.S. 511, and the Ninth Circuit in *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (1917), both considered and upheld the consignment method of merchandising against antitrust attack. In the *Cole* case the court had said, "Surely the Cole Company had the right to determine that its agents should sell its cars at its own price." (p. 284) The *Boone* case contains an exhaustive opinion on the subject; the court there said, among many other pertinent things,

> "Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it

37. The agreement held to be illegal in the *Dr. Miles* case sought to require wholesalers to sell, at prices set by the manufacturer, not only the goods consigned to them *but goods purchased by them as well*. As stated by the Court:

> "[The bill] * * * does not allege that the goods procured by the defendant from 'wholesale agents' were goods consigned to the latter for sale. [p. 397]
>
> * * *
>
> "It is * * * a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers * * *" [p. 399]
>
> "The agreements are designed to maintain prices, after the complainant *has parted with the title to the articles* * * *" (p. 407).

may see fit: *It may decline to deal with the trade at all, and, dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents.* Accordingly it may lawfully appoint an agent * * * authorized to sell its cars, limiting his authority to sales * * * for a fixed price; * * *.

"The intent of the parties is clear enough, and the only question is whether effect can be given to such intent. * * * what public interest would be subserved by striking down the contract and thwarting the intent of the parties thereto? * * * it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. * * * plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. * * *" (p. 340)

Simpson repeatedly cites *United States v. Richfield Oil Corporation*, 99 F.Supp. 280 (S.D. Cal. 1951), aff'd 343 U.S. 922 (1952), as holding that all gasoline service station lessees are buyers whose prices cannot be fixed by the supplier. The case held no such thing, for it involved service station operators who *bought* and then *resold*. As the court carefully pointed out (99 F.Supp. 280, 289):

"The operator pays for his gasoline and the petroleum products *sold* to him by Richfield. *They are not merely consigned to him.*"

CONSIGNMENT DOES NOT CEASE TO BE LEGAL BECAUSE THE CONSIGNOR HAS MANY CONSIGNEES.

Simpson contends (Br. 65) that if a consignment agreement with one dealer is legal, illegality enters if there is more than one such agreement or a large number of them. Nothing in

reason supports this contention. The antitrust laws do not limit a vendor to one agent. *United States v. General Electric Co.*, 272 U.S. 476 (1926), not only upheld the legality under the antitrust laws of consignment but dismissed as irrelevant the fact that there were many consignees instead of one or a few. There, as noted, at p. 40 above, General Electric had 400 consignees in one class and 21,000 in another. The Court rejected as without merit the very argument Simpson makes, which the Court described thus (p. 485):

> "But it is said that the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Antitrust law."

It follows that nothing derogatory can be deduced from the fact that the consignees charge the same price.[38] The antitrust laws do not prohibit one from selling through all his agents at the same price. Indeed, if he sold at different prices through different agents in the same market he might be in violation of the Robinson-Patman Act.

If selling through consignees is to be outlawed, it is for Congress to do so. The subject has been studied by a sub-committee of the House (See R. 112-178), and no prohibition has come forth; it cannot be found in the Sherman Act.

ANSWER TO OTHER ARGUMENTS OF SIMPSON ON CONSIGNMENT.

Simpson cites two recent decisions of the Federal Trade Commission involving supposed consignment, *Sun Oil Co.*, Docket

38. While in places Simpson's brief suggests that Union directed all consignees to charge the same price, in his pretrial statement he stated that Union's prices varied between cities and between zones within a city (R. 207).

6934[39] and *Atlantic Refining Co.*, Docket 7471.[40] In neither case did the Commission challenge or doubt the legality of consignment. Concurring in the *Sun* case, Commissioner Anderson said:

> "I concur in the result. I am not sure that the majority opinion spells out in positive fashion the assurance that the time-honored business practice of consignment selling is not interdicted. It should be clearly understood that the general practice of consignment selling is not attacked by the Commission because of the practices of respondent in this case. This case should stand for this case only.
>
> "Consignment selling is a lawful business method. I don't think it is necessary for the Commission to take business enterprisers on its lap and explain how honest 'consignment selling' should be carried on, but it should at least say that the practice is not generally condemned."

The basis of the decision in the *Sun* case was that Sun Oil did not of its own decision adopt consignment but did so in conspiracy with its purchase and sale dealers as a result of mass meetings with them to determine how to end a price war. The Commission's opinion states:

> "Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices *horizontally*; Sun, in the presence of the dealers, pledged to fix prices *vertically*.
>
> * * * Sun, unlike *United States v. General Electric Co.*, 272 U.S. 476 (1926), did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements * * *."

39. 1963 CCH Trade Reg. Reporter ¶ 16,418.

40. 1963 CCH Trade Reg. Reporter ¶ 16,422.

Whether the evidence in the *Sun* case warranted that conclusion does not concern us here. Here, there was no such arrangement among Union and its dealers. No conspiracy here was charged. No claim was made by Simpson that he had evidence of any such arrangement. As we saw at pp. 34-36, supra, at one point in the pre-trial conference Simpson's counsel spoke of deducing a horizontal conspiracy among Union and its dealers but (1) he explicitly stated that this was *not* a question of fact, on which he would proffer evidence, but that if he made the argument it would be solely as a legal deduction from the fact that Union had consignment agreements with numerous dealers, and (2) he then withdrew the contention. Obviously, the deduction is unsound.

In the *Atlantic Refining* case,[41] the Commission's main finding was that Atlantic conspired with its wholesale distributors, who were purchasers and not consignees, to fix retail prices, and that it used consignment to dealers as part of this overall conspiracy. Secondarily, it found a difference between the *General Electric* case and the facts before it, in that Atlantic did not actually make its dealers its agents, it did *not* adopt consignment *as a regular and permanent marketing method*: the regular method continued to be outright sale to the dealers, and Atlantic shifted back and forth to an alleged consignment in price war situations. Said the Commission:

> "There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. * * * * * * *
>
> "* * * there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. * * * * * * *

41. The *Atlantic Refining* case was a decision of but two commissioners. Two others did not participate, and Commissioner Elman did not concur.

> "Unlike General Electric, the agency distribution program *was not respondent's regular method of selling its products*. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method." [1965 CCH Trade Reg. Reporter, ¶ 21,289]

Moreover, when there was a temporary shift to supposed consignment, the dealer was not paid for the stock of gasoline he had already bought.

By contrast, *Union's method* is like that in the *General Electric* case, a *permanent and universally applied method of distribution.* In the *Atlantic* case the Commission thought a number of provisions — not present in Union's arrangement — inconsistent with consignment; for example, the dealers commingled money from the sale of gasoline with their receipts from the sales of products other than gasoline (p. 21,289). The Union consignment agreement provided, on the contrary (¶ "Second (8)", R. 98):

> "He [consignee] will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds." (R. 98)

The Commission in the *Atlantic* case cited, and Simpson relies on, *United States v. Masonite Corp.*, 316 U.S. 265 (1942), but Masonite involved a conspiracy among competitors.[42] Union's con-

42. Masonite and 9 competing manufacturers (p. 267) entered into a horizontal agreement to fix the prices of their respective products through the use of identical agency agreements. Following patent disputes Masonite entered into the same kind of arrangement with each of the competitors,

signees were *its agents*, not its competitors. As co-agents of the same principal, they were no more competitors of each other than salesmen of the same employer paid on a commission basis. Simpson's argument becomes even more untenable as it is pressed. The consignee-dealers, he says (Br. 66), compete with companies who buy gasoline from Union and with other major refiners. But Union would not be denied the right to set the price at which it sells gasoline at retail, if it sold through wage-paid employees, merely because it sold gasoline at wholesale to some competitors and competed with still others. That it uses commission paid agents is not a relevant difference.

B. The "Retail Dealers Consignment Agreement" Was a Consignment Agreement.

There is argument in Simpson's brief that the document called "Retail Dealers Consignment Agreement" was not a consignment agreement at all (pp. 62-65). *It should first be noted what Simpson means by this contention.* He does *not* contend that evidence would show that the arrangement between the parties was something other or different from what provisions of the written document show. What he means is that the terms of the written agreement are terms of sale and not terms of consignment. In the District Court Simpson stated that his attack on the legality of the arrangement was confined to the arrangement as shown by the documents. Quoting again part of what we quoted at page 33,

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each knowing that Masonite proposed to make substantially identical agreements with all, and the several agreements being placed in escrow to become effective only when all had agreed to them (p. 270). Masonite limited its own freedom of action by binding itself to adhere to the prices in its own sales which it fixed for the others (p. 271). This was a clear conspiracy within the *Interstate Circuit* doctrine (p. 275). The Court's emphasis was on the fact that the agreements were entered into between competitors, "and that the purpose is to fix prices at which the competitors may market the product * * *" (p. 279). "In this case, the price regulation was based on mutual agreement among distributors of competing products, some of whom had competing patents, as we have noted" (p. 280).

supra, Simpson's counsel stated at the pre-trial conference (R. 378):

> "I say there are two issues in this case [on] the issue of liability: No. 1, the consignment agreement is unlawful on its face as a matter of law. And this, of course, I would have no objection to presenting in a pretrial of partial summary judgment."

And this is the position taken in Simpson's brief in this Court.[43] This, of course, is simply a question of contract interpretation, which is a pure question of law since the agreement is in writing.

From the outset the case proceeded on the basis that the contract was exactly what it calls itself, one of consignment. Thus Simpson swore in an affidavit

> "that at all times from the period May, 1956, to May, 1958, the defendant in the above-entitled action placed me under a consignment method of selling gasoline" (R. 63)

and that

> "Union Oil Company paid me on a consignment commission basis" (R. 64).

He stipulated that it was *"defendant's [Union's] gasolines"* that were being dispensed under *"consignment agreements"* (R. 61), and he testified on deposition that he never *bought* gasoline from Union *"because it was on consignment"* (R. 311).

The agreement is ineluctably a consignment agreement. Since we digested its terms, with record references, at pp. 13-15, supra, we merely recapitulate here.

The agreement is wholly different in its nature and its legal and economic consequences from one of sale and purchase. A buyer takes title. Simpson did not. A buyer takes the risk of ownership.

43. Thus his brief (p. 62) asserts that, "It is manifest from the provisions of the consignment agreement that Union has not kept the risks of ownership * * *."

Simpson did not. A buyer is obligated to pay for the product whether he sells it or not. Simpson was not. The agreement not only provided that ownership of all gasoline would remain in Union until sold by Simpson, but it placed the burdens and risks of ownership on Union. It, not Simpson, was to pay all *property taxes* on gasoline while in Simpson's custody.[44] It, not he, was to be responsible for loss or damage to the gasoline from fire or explosion (not caused by his negligence) as well as from earthquakes, lightning or flood. Simpson (Br. 70) tries to distinguish the *General Electric* case on the ground that General Electric assumed the risks of price decline and carried whatever insurance on the goods was carried. But so did Union. A purchaser is liable for the agreed purchase price, which is determined at the date of delivery of the goods to him, and he remains liable even though its value falls before he sells it. Such was not the case with Simpson under the consignment agreement. Under ¶ "Second (7) and (8)" (R. 98) his obligation was to account for the proceeds of the gasoline only when sold. Thus no risk of decline was on him, and Union assumed all the risks of the kind against which one might wish to insure.

Simpson asserts (Br. 63) that "the consignee had to absorb a substantial portion of price declines" or "a portion of the decrease in market prices". It is a rare thing for compensation on a commission basis not to be geared to proceeds; that is the very nature of commissions. But there was a world of difference between the consignee's commission and the chances of profit of a dealer buying and reselling gasoline. The latter's gross profit is the difference between what he pays and his resale price and decreases or increases by the whole of any drop or rise in the resale price. By virtue of the Union's commission formula, the consignee's

44. A contrary statement at p. 70 of Simpson's brief is patently mistaken. So is a statement on p. 19 that the consignee was to pay for insurance on stored gasoline; there was no such provision.

commission did not fall by the whole of any decline in retail price. A complete commission schedule covering a wide range of possible retail prices appears at R. 82-85 showing what commissions would be after the removal of the guaranteed minimum. It will be seen, for example, that as the retail price dropped to 10¢ below the base line, the commission declined by only 2½¢ (from 7¢ to 4½¢) (R. 84). So long as Simpson was a consignee, he was, moreover, protected by a guaranteed floor, originally 5.95¢, and later 6.6¢, per gallon on regular and originally 5.75¢, and later 7.1¢, per gallon on premium gasoline (see page 15, supra). Simpson's remuneration was not subject to the risks of the market place that a buyer for resale must suffer. He was not obligated to pay for the gasoline but only to account for the proceeds when received. He did not have to rely on ability to resell at a profit. He was guaranteed a commission, he was well aware of the guaranty, and he knowingly availed himself of it. Thus he testified (R. 471):

> "Q. * * * throughout the period of this price war that you have told me about, in October, you were receiving the guaranteed commission, were you not, 6.6 and 7.1?
>
> * * *
>
> "And it didn't make any difference to what price the retail price, to what level, the retail price fell, you still got 6.6, 7.1 gross at that time?
>
> "A. Yes."[45]

The reality of this very guarantee is a fact on which the court commented in *United States v. Standard Oil Company of Cali-*

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45. Simpson asserts (Br. 21) that when the consignee accounted to Union for the proceeds of its gasoline after sale by him, after deducting his commission, "ordinarily the dealer will thus pay respondent the same price as he would if he had bought at respondent's tankwagon prices." This is plainly incorrect. Furthermore, a dealer buying for resale could run up his retail price as far as the public would stand. A consignee could not, for any unauthorized increase by him would not increase his commission, since the whole of the "unauthorized add-on" had to be accounted for to the consignor (R. 70).

fornia, 1958 Trade Cases, ¶ 69,212 (S.D. Cal.), when it noted that some 1200 dealers who owned their own stations and were not dependent on Union for leases nevertheless chose to be Union consignees. Said it (p. 74,760):

> "* * * The factoring setup may provide a security for these dealers which they find more desirable than the rough and tumble of operating their own business."

Simpson argues that the agreement made him accountable in case of loss from causes other than fire, explosion, earthquake, lightning and flood, but in *United States v. General Electric Co.*, 272 U.S. 476 (1926), this Court rejected an identical argument. There the agreement provided that

> "the agent is to pay to the company the value of all of the company's lamps lost or missing from or damaged in the stock in his custody. * * * the company has assumed all risk of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents, and pays whatever taxes are assessed. This is relevant as a circumstance to confirm the view that the so-called relation of agent to the company is the real one." (pp. 482, 483)
>
> * * *
>
> "We find nothing in the form of the contracts and the practice under them which makes the so-called B and A agents anything more than genuine agents of the company, or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such. He is not obliged to pay over money for the stock held by him until it is sold. * * * *There is no conflict in the agent's obligation to account for all lamps lost, missing or damaged in the stock. It is only a reasonable provision to secure his careful handling of the goods entrusted to him.*" (p. 484)

Simpson also argues that under para. Second (3), (4) and (5), (R. 95-96), he was to pay his own income taxes and all taxes and

contributions measured by the wages paid *his* own employees and the expense of conducting his business, including license fees (Br. 63). But this is simply related to the fact that he was conducting *his own* business, i.e., that of a consignee. There is no inconsistency between being an independent businessman and being an agent. As we have seen (pp. 41, 43, supra), both California Civil Code § 2026 and the Consent Decree in *United States v. Standard Oil Company of California*, supra, define a consignee as one who "in the pursuit of an independent calling" is engaged by another as his agent to sell property. Provisions like those in the agreement here are common to consignment agreements. In the *General Electric* case, supra, the agreement provided that (272 U.S. 476, 482):

> "* * * The agent is to pay all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps, and all expenses incident thereto and to the accounting therefor and to the collection of accounts created."

This Court said:

> *"We find nothing in his agreement to pay the expense of storage, cartage, transportation (except the freight on the original consignment), handling and the sale and distribution of the lamps, inconsistent with his relation as agent.* The expense of this is of course covered in the amount of his fixed commission. The agent has no power to deal with the lamps in any way inconsistent with the ownership of the lamps retained by the company. When they are delivered by him to the purchasers, the title passes directly from the company to those purchasers." (p. 484)

In *Texas Co. v. Higgins*, 118 F.2d 636 (2 Cir. 1941):

> "* * * Thomas agreed to sell the plaintiff's 'petroleum products' as 'consigned to him,' and to account for the proceeds when collected; he was to sell at the plaintiff's prices, to bear all expenses except freight and taxes on the products consigned, to furnish his own trucks and other equipment

which must conform with the plaintiff's standards, and at his expense to hire and pay the wages of all necessary assistants, over whom he assumed full control and responsibility and for whose acts he was to indemnify the plaintiff if necessary."

Judge Learned Hand saw no problem in finding this to be normal consignment.

In *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917), the consignee was required by the agreement to be responsible for the rents, taxes, wages, or other charges or liabilities of any nature arising out of or in connection with his business. The court rejected the contention that the distributor was a vendee and not a consignee (p. 337):

Real estate brokers and stock brokers are also independent businessmen. They pay their own income taxes, license fees, employees' wages, and the like, but they are still agents, and when they charge for property the price set by their principals, there is no price-fixing conspiracy. Insurance brokers, property custodians, all operate the business of an agency in the same way.

Still another respect in which consignment differs in economic consequences from purchase by a dealer is that the consignee is not required to make any investment in inventory. While Simpson's brief repeatedly comments (e.g., pp. 26, 28) that he had to make a substantial investment when he took over the Fresno station, his "investment" consisted of purchase of tools and an inventory of TBA (tires, batteries and accessories) owned by the former lessee.[46] But he did not have to buy any inventory of gasoline:

"Q. But not gasoline.

"A. It didn't include gasoline because it was *on consignment*" (R. 311).

46. He purchased $1800 of these from the prior lessee. Union assisted him in acquiring an additional $1400 of items by purchasing them from the former lessee and selling them to Simpson on a conditional sales contract (R. 310, 311).

Simpson concludes his argument on the subject in pointless statements; for example, that Cal. Civil Code § 2027 allows a factor to sell at the market price after reasonable notice for his reimbursement. What Section 2027[47] provides is that a consignee "must obey the instructions of his principal" but, if he has advanced money to his principal on the security of the consigned goods, he may sell them as a pledge at market price, even though the principal had forbidden him to do so, to reimburse himself. If Simpson had lent money to Union or advanced money for it, he would have been entitled to treat the consigned gasoline as a pledge, and if Union failed to pay him, he could have sold at market, under this Code section. But it is not claimed that Union ever owed Simpson any money or failed to pay him. With equal irrelevance Simpson adds (Br. 64) that a factor may renounce his agency at any time. As we have seen (p. 9, supra), so he could here.

Other arguments by Simpson find their answer in *Ludvigh v. American Woolen Co.*, 231 U.S. 522 (1913), and *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917). Both dealt with whether agreements were of sale or consignment and held them to be consignments, rejecting as unmeritorious arguments similar to those Simpson makes here.

IN VIEW OF THE McGUIRE ACT, THE ATTEMPT TO DENY THAT THE CONSIGNMENT AGREEMENT WAS A CONSIGNMENT AGREEMENT IS AIMLESS.

Any effort to hold the "Retail Dealer Consignment Agreement" to be violative of the Sherman Act must start by treating it as an agreement of sale by Union and purchase by Simpson containing a resale price clause. Short of that the case does not even begin. But were the agreement so regarded, the resale price clause would not have been illegal, for it would have been a valid *fair trade* agreement.

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47. Quoted in the Appendix hereto.

The McGuire Act[48] (15 U.S.C. §45(a)(2)) provides that nothing in the antitrust acts

> "shall render unlawful any contracts or agreements prescribing minimum or stipulated prices * * * for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute * * * in effect in any state * * * in which such resale is to be made * * *."

California's Fair Trade Act (Cal. Bus. and Prof. Code, § 16,900)[49] is just such a statute. The McGuire Act was Congress' assertion of paramount federal policy after *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The California Supreme Court, in *Scovill Mfg. Co. v. Skaggs, etc.*, 45 Cal. 2d 881, 291 P.2d 936 (1955), reasserted, in the face of renewed attack on fair trading, that it represented public policy in California.

Union's gasolines handled by Simpson—its "Royal 76" and "7600" brands—are branded products (R. 15, 100) and were in competition with gasolines of other companies (¶ 22, R. 55), such as Standard Oil Company of California, Tidewater Oil Company, Richfield Oil Corporation, General Petroleum Corp., Texas Company, Shell Oil Company, and others (R. 16).

Consequently, the requirement that the dealer charge prices stipulated by Union was legal, *even if* the arrangement were a sale and not consignment, regardless of what it was called. *United States v. Socony Mobil Oil Company*, 150 F. Supp. 202 (D. Mass 1957),

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48. Quoted in the Appendix hereto.
49. Quoted in the Appendix hereto.

certified to this Court, 252 F.2d 420 (1 Cir. 1958), appeal dismissed 356 U.S. 925.[30]

To avoid this fact, Simpson below relied on *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and pointed to the fact that Union operates 12 retail outlets in California. But what this Court held in the *McKesson-Robbins* case was *not* that a vendor may not fair trade a middleman's price merely because the vendor somewhere sells directly to consumers. What it held was that if the vendor competes with his own customer, he cannot fair trade that customer's prices, because in that situation the resale price agreement ceases to be a vertical arrangement authorized by Fair Trade Acts and becomes a horizontal agreement between competitors. This is the plain rationale of the *McKesson* case, and this is how the courts have understood it. *G.E.M. Sundries Company v. Johnson & Johnson, Inc.*, 283 F.2d 86, 92 (9 Cir. 1960); *G. D. Searle & Co. v. Insl. Drug Distributors*, 151 F. Supp. 715, 722 (S.D. Cal. 1957).

Union never sold gasoline in competition with Simpson. About 2,377 retail outlets sold Union's gasoline in California (R. 332). The 12 operated by Union itself (R. 333) were all for training and experimental purposes, and not one was located in Fresno, California. Eleven were located in Los Angeles and environs,[31] and one

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30. In *G. D. Searle & Co. v. Insl. Drug Distributors*, 151 F. Supp. 715 (S.D. Cal. 1957) (per Yankwich, D.J.), a defendant druggist resisted a trademark suit by a manufacturer on a contention of monopolistic practices and price fixing in that the manufacturer had authorized defendant and other wholesale druggists to make bids to institutions at specified prices on a commission of 10% and had withdrawn defendant's privilege to do so because it bid below the specified prices (pp. 721, 722). The court held that there was no violation of the antitrust laws because the arrangement was one whereby the druggists became the agents of the manufacturer in placing the products in institutions and that, even if the transaction were one of sale and resale, it was exempt as fair trading from the antitrust law (pp. 722, 723).

31. Los Angeles, Beverly Hills, Pasadena, Lakewood, and Anaheim (R. 333).

in San Francisco (R. 353). Courts take judicial notice of the geographic fact that Fresno is about 217 miles from Los Angeles and 183 miles from San Francisco.[52] Whether Union could validly fair trade in Los Angeles or San Francisco is a question not involved in this case.[53] Union was selling at retail in the Fresno area *only* if its method of merchandising was what we say it was, consignment. In that event Simpson was not its competitor but its agent in selling its gasoline; and when it set the price at which its gasoline was to be sold at his station it was not setting his price but its own. Conversely, were it to be said that it sold to Simpson and did not consign, then it was not a retail marketer in Fresno at all and it could validly fair trade in that city; a resale price agreement between Union and Simpson would not have been a horizontal agreement with a competitor.

Simpson's brief (p. 14) also asserts that "Union operates a chain of off brand service stations in the State of California operating under the name of Westways." But the record cited for this assertion (R. 446-49) states something entirely different. It is that Union has an ownership interest in a corporation called Westway which operated its own business. Moreover, the fact that Westway sells "off brand gasoline" would alone make *McKesson & Robbins* inapplicable (*G. D. Searle & Co. v. Inst. Drug Distributors*, 151 F. Supp. 715, 722), as does the fact that Westway's area of operation in California is in the Los Angeles basin.

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52. *Deutch v. United States*, 367 U.S. 456, 470 (1961):
"Indeed, we may take judicial notice of the fact that Ithaca is more than one hundred and sixty-five miles from Albany, and in an entirely different economic and geographic area of New York."

53. Under cases like *Revlon, Inc. v. Janel Sales Corp.*, 1960 Trade Cas. ¶ 69,602 (N.Y. Sup. Ct.) and *Revlon, Inc. v. Wagonfeld*, 1959 Trade Cas. ¶ 69,353 (N.Y. Sup. Ct.), the maintenance of a station for training purposes would not prevent fair trading in San Francisco or Los Angeles.

C. Union's purpose.

To bring the case to a clear posture for its motion for summary judgment, Union acceded to Simpson's request to stipulate that "one of its purposes" was to control the prices at which Union's gasoline was sold to the consumer[54] (R. 414, 429). Simpson now emphasizes this purpose. But we submit, as a matter of common sense, that this is not a relevant fact. Every marketer of goods has a choice of methods. Each method has its advantages and its disadvantages, its burdens and its benefits. By selling directly to the consumer, the vendor may legally determine the retail price. The antitrust law does not say that it is illegal for a vendor to do so; what it illegalizes are contracts, combinations and conspiracies in restraint of trade, and monopolization, attempts and conspiracies to monopolize. As Mr. Justice Holmes frequently admonished, it is not "evasion" to do what the law does not prohibit, *Bullen v. Wisconsin*, 240 U.S. 625, 630 (1916). As said in *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335, 340 (9 Cir. 1917), in upholding consignment against antitrust attack,

> "In short, the plaintiff may lawfully do precisely what it professes to be doing under the existing contract, and the question therefore is not whether its object is legitimate, but whether the means it employs are unlawful or are for some other reason ineffective."

D. Epithets about compliance.

Scattered throughout Simpson's brief are words like "policing", "compliance system", and "predatory" (E.g., Br. 5, 23, 25, 39, 66). These are but Simpson's characterizations of the facts described, not a reference to any additional facts. All Union did, after entering into a consignment agreement, was to keep in touch with the

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54. At R. 415, quoted in Appendix C to petitioner's brief, Union's counsel is quoted as referring to sale of gasoline "to the consigned stations". The correct transcription is "through the consignee stations."

consignee through its representative to its dealers to see whether he was abiding by the agreement.[55]

Simpson's citation in this connection (Br. 60) of *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960), has no foundation. That case did not involve consignment but sale to wholesalers, resale to retailers and resale, again, to consumers. A vertical agreement respecting *resale* prices, absent a fair trade statute, is illegal, and a horizontal agreement respecting resale prices is never legal. On the other hand, as *Parke Davis* holds, an announcement by a vendor of its policy not to sell to price-cutters followed by refusal to deal with those who disregard the policy is legal. The question in the *Parke Davis* case was whether there was this unilateral conduct or agreement. To that end the Court examined a variety of activities and concluded that there were both vertical resale price agreements and horizontal agreements.[56]

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55. Additionally, Simpson's brief contains a number of inexcusable innuendoes. It states (at p. 25) that "in 1956 there were 765 cancellations of leases (R. 156). 559 were mutual cancellations for other than financial difficulties (R. 156 . . .)". The innuendo is that these were connected with noncompliance with consignment or refusal to become consignee. Nothing could be falser. The record reference is to answers given in 1957 to a subcommittee of the House of Representatives, in the record by a request for admissions (R. 111, et seq.). The record is plain that all these were *mutual* cancellations. 206 caused by the dealer's financial difficulties, and the others "in the order of their frequency of occurrence were: Other business preferences; leased another station, either with Union or competitive; ill health; termination of Union's lease from station owner; death or moved from area; domestic difficulties; partnership dissolution" (R. 156). In 1957 there were 3 instances where expired leases were not renewed, in 1956, ten (R. 156).

56. There were two sets of facts in the *Parke Davis* case that established conspiracy. Parke Davis informed each of its customers that it was speaking to others and had obtained agreement of each to adhere if the others did; *this* was the conspiracy and combination:

> "Parke Davis did not content itself with announcing its policy * * * and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices * * *. In thus involving the wholesalers to stop the flow of Parke

In the present case an agreement between Union and its dealer respecting retail price need not be labored or deduced; it is in the written document. The question is not whether there was an agreement but whether the legality of the agreement can be denied since it is one of consignment or protected by the McGuire Act. As to that, *Parke Davis* says nothing. And in the present case there was no horizontal conspiracy. It cannot be inferred from the mere fact that Union had a considerable number of consignment agreements, and Simpson has disavowed claiming any other basis for an argument that a horizontal conspiracy existed (see p. 35, supra).

E. The claim of monopolization.

In the Statement of the Case (at p. 17, supra), we pointed out that there were approximately 36,000 service stations on the West Coast of which 21,000 were either owned by dealers themselves or leased by them from third persons other than any of the seven largest oil companies. The total number of retail outlets selling Union gasoline was about 3600 on the West Coast of which 2377 were service stations in California. But in only 1335 in California did Union have any property interest by fee or lease. About 21,000 other stations in California sold products supplied by more than 16

Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices. Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." (p. 45)

The second set of facts was this (R. 46-47):

"Moreover, * * * it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy."

refiners. Union gasoline was only about 11.5% of the total gasoline sold through service stations of any and all kinds in California. There were at least 246 service stations in Fresno, California of which only 26 were selling Union gasoline.

Courts judicially know that this competitive situation prevails throughout California where there is a "rather extensive list of great corporations engaged in the manufacture and sale of petroleum products." *Paraco, Inc. v. Dept. of Agriculture*, 118 C.A.2d 348, 353, 257 P.2d 981, 984 (1953), and this Court has noted that even Standard Oil Company of California, selling 23% of the gasoline in the Western area and with its company-owned service stations selling 6.8% of the total, did not have a dominant position. *Standard Oil Co. v. United States*, 337 U.S. 293, 295, 302 (1949).

Under these facts the claim is not—it could not be—that Union monopolized or attempted to monopolize the gasoline business. That would be frivolous, and it was disavowed by Simpson in the District Court (see p. 16 supra).[57] It is not—nor could it be—that Union monopolized or attempted to monopolize service station sites; that would be even more ridiculous. There were over 23,000 service stations in California, and Union owned or held leases on only 1335. Moreover, the possible number of service stations is infinite, for there is endless realty in California and anyone can erect a station who wishes.

Consequently, the claim must be that Union "monopolized" or "attempted" to monopolize its own brand of gasoline. But it is

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57. At Br. 74 Simpson speaks of Union as having "the ability to control prices." If Simpson means by this a power to control the price of gasoline in California in the face of all the competition described above, he indulges in palpable nonsense. His own descriptions of the record elsewhere in the brief (e.g., Br. 22) show that Union's effort in the early part of the period in question was to try to get a few cents more than major competition, if possible (R. 231-32). But it gave up the effort and adopted the policy of following major competitors' prices downward (R. 75, 256, 282), and, if Standard's prices were lower than others, to go as low as Standard (R. 75, 283).

elementary that the power which manufacturers have over their own trademarked products is not the power that makes an illegal monopoly." *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957); *Nelligan v. Ford Motor Co.*, 262 F.2d 556, 557 (4 Cir. 1959);[58] *A-1 Business Machine Company v. Underwood Corp.*, 216 F.Supp. 36 (E.D. Pa. 1963).[59]

Simpson comments that gallonage sold by Union was large (Br. 14). This is irrelevant to "monopolization". E.g., *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 1963 Trade Cases ¶ 70,886, at p. 75,564 (9 Cir., Sep. 1963). Standard Oil Company of California sells much more gasoline directly to the consumer than does Union. Yet Simpson concedes that Standard does not thereby violate any antitrust law. No law required Union to sell its gallonage to a middleman for resale or precluded it from selling directly

58. Thus in the *Nelligan* case the court commented,

> "* * * Plaintiffs do not allege that Ford monopolized or attempted to monopolize the market for automobiles, parts or accessories generally, but only the market represented by its own franchise dealers * * *."

and that, it held, was not a violation of the law.

It is preposterous for Simpson to invoke (Br. 74) the case of the aluminum monopoly (*United States v. Aluminum Company of America*, 148 F. 2d 416) and the Circuit Court opinion in *American Tobacco Co. v. United States*, 147 F.2d 93 (Br. 72); when this Court took and decided that case, it emphasized that its essence was that the *Big Three Tobacco* companies had horizontally conspired to monopolize (328 U.S. 781, at 784-86, 798, 800).

59. In the *A-1* case this is said:

> "It has long been recognized that a manufacturer has a right to a monopoly in the sale and distribution of its own product. Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923). This may be and often is accomplished through exclusive dealers or agents. A large part of our economic growth has been due at least in part to this method of doing business. Unless the right to seek and maintain such a monopoly continues a large part of the efficiency of our distributive system may be lost." (p. 37).

to the consumer. *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 at 340 (9 Cir. 1917) (quoted at p. 46, supra). As said in *Schwing Motor Company v. Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md.), affirmed on the opinion of the District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957), a Sherman Act case involving a refusal to renew a dealer's one year contract:

> "Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name. [Citation]. If he is engaged in a private business, he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers, as he may deem most profitable to him. If he chooses the latter method, he may exercise his own independent discretion as to the parties with whom he will deal. This is a common law right which the anti-trust laws have not destroyed. [Citations] * * *" (p. 902).

In *Alexander v. Texas Company*, 149 F. Supp. 37 (W.D. La. 1957), the court described an identical claim of attempted monopolization in a case of termination of a service station lease as "sheer nonsense" (p. 44).[60]

The pointlessness of the claim of monopolization is shown by the following colloquy (R. 440, 441):

> "The Court: There is no argument about the proposition that if Union had operated this station or all of these stations directly through its own employees; they could fix any price they wanted to?
>
> "Mr. Keith: No question about that.
>
> * * *
>
> "If you say you are putting $100,000,000 into the station[s] and it is a tremendous investment, then you can make these

60. This is particularly applicable to Simpson, for his station did no more than 1/5 of 1% of the gasoline business in Fresno (R. 17), and the amended complaint alleged (¶ 22, R. 55) that three service stations selling the products of Standard, Tidewater and Richfield were "directly competitive" to the service station leased by him.

people your employees and you can control prices. It is your product and you can do anything you want with it * * *."

While counsel then sought to distinguish this case, there is no escaping his recognition that, if Union had operated the same number of stations through wage-paid employees, selling the same gallonage, there would be no violation of the antitrust laws. That should be a complete answer to the claim of monopolization, for there is no more monopolization where Union leases out its stations and engages the lessees as its agents than where it operates the stations by its own employees. If consignment makes a difference, the difference must be in consignment, unaided by rhetoric about monopolization. Else words have no meaning.

F. The claim of exclusive dealing.

This is a sham claim for three reasons.

1. SIMPSON FOUNDS NO CLAIM OF DAMAGE ON EXCLUSIVE DEALING.

In a private suit for damages the plaintiff cannot roam at will in charges of violation of antitrust laws but must confine himself to such as have caused damages of which he complains. *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653, 657 (1 Cir. 1961), cer. den. 368 U.S. 931, and cases cited at p. 80 infra.

As we have seen (pp. 9-11, supra), Simpson claims *but two* types of damages: (1) from "inability" to charge for gasoline what he wished, and (2) from Union's refusal to give him a new lease, and the sole reason claimed by Simpson for that refusal was that he sold consigned gasoline at prices other than specified by the consignor; as put in his brief (p. 24), "The respondent refused to renew petitioner's one year lease because he did not abide by price orders." No damage from "exclusive dealing" has been asserted.

2. UNION COULD LEGALLY HAVE REQUIRED ITS AGENT TO HANDLE ITS GASOLINE ALONE.

It is legal under the antitrust law for one to require a consignee —an agent—to handle no one else's product. *Federal Trade Commission v. Curtis Pub. Co.*, 260 U.S. 568 (1923). Union could lawfully have required its consignees to handle its gasoline alone. It also leased to Simpson the gasoline pumps and the underground storage tanks (R. 28). It could lawfully have limited Simpson's use of this leased equipment to its gasoline. *Federal Trade Comm. v. Sinclair Co.*, 261 U.S. 463 (1923). Thus the Consent Decree in the West Coast Oil case, *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399 (S.D. Cal.), provided in para. XIV(2)(ii) (p. 75,533):

> "[A]ny consenting defendant may require that any pump or tank * * * for refined petroleum products * * * furnished by it and marked as such to a dealer shall be used solely for the storing, handling or dispensing of such products supplied by such defendant * * *."

3. THE SOLE FACT TO WHICH SIMPSON CONFINED THE CLAIM IS NO EVIDENCE AT ALL OF ANY "EXCLUSIVE DEALING" AGREEMENT.

While it legally could have, Union neither required its consignee to handle its gasoline nor limited use of its leased equipment. As already noted (p. 20 supra), neither lease, consignment agreement, nor any other writing required Simpson or any other dealer to deal solely with Union. In addition, in support of its motion, Union filed an affidavit of its General Sales Manager that

> "No lease or contract between Union and plaintiff required him to buy any products of the Union Oil Company of California or not to handle or sell products made by anyone else." (R. 38)

In response, it was incumbent on Simpson under F.R.C.P. Rule 56(e) to adduce some evidence if he wished to raise an issue of fact. See pp. 36, 37, supra; also *Gold Fuel Service, Inc. v. Esso*

Standard Oil Co., 306 F.2d 61 (3 Cir. 1962), cer. den. 371 U.S. 951.[61] Instead, as we have seen (pp. 20, 21 supra), Simpson rested his claim on one fact alone, viz., that Union has only one "split-pump" dealer. As the District Court below correctly reacted (R. 434), that lone fact is simply no evidence that Union required its dealers to refrain from handling the gasoline of others. It could not carry the issue to a jury, for it would not support a verdict that Union entered into an agreement with its dealers that they would handle no other gasoline.

In the Statement of the Case we cited (at p. 23) the California statutes, designed to protect the public from fraudulent substitution, which require gasoline pumps and tanks to be labelled with a brand or trademark and prohibit dispensing any other brand of gasoline from or through the equipment. If Simpson or any Union dealer had wished to handle another brand of gasoline than Union's, State law would thus have required him to repaint and relabel the station and remove Union's insignia and colors or to have separate tanks and pumps separately painted and not even located under the same canopy. No claim has ever been made that Simpson wished to do this or that he could have recovered the extra investment had he done so.[62]

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61. As said in the *Gold Fuel* case, where summary judgment in an anti-trust case was affirmed:

> "This omission is fatal to the plaintiff's case even before trial, at least where uncontradicted affidavits and other documentary material submitted on motion for summary judgment, if true, provide a conclusive negation of the generally pleaded conspiracy claim, and plaintiff has failed to take advantage of ample opportunity by discovery or otherwise to contradict defendant's showing."

62. Colloquy at R. 434:

> "The Court: * * * You would have to have two separate tanks, wouldn't you, underground?
>
> "Mr. Keith: Well, yes, you would have to have—
>
> "The Court: You would have to have two different deliveries?
>
> "Mr. Keith: Well, you have this kind of a situation.
>
> "The Court: Double pickups."

Impartial observers recognize that split-pump stations are unacceptable to the public and to informed service station operators. The U. S. Department of Commerce in its "Establishing and Operating a Service Station", published in 1945 for the guidance of veterans returning to civilian life, stated (pp. 97, 98):

> "It is the opinion of most people in the trade that one-brand stations are most successful, on the average, than are stations that sell more than one brand. According to the statements of many operators in the business, stations that sell two or more brands of gasoline often fail to realize their greatest potential volume of business because approaching motorists find it difficult to associate the station with any one brand."

Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, points out that the one brand station method of merchandising is virtually demanded by the motoring public. In I Whitney, Antitrust Policies, (The Twentieth Century Fund, New York, 1958), he states, pp. 129-30:

> "Although the *Standard Stations* and *Richfield* cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. 'Split pump stations,' as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 per cent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales."[63]

63: In 1931, *United States v. Standard Oil Company of New Jersey*, 47 F.2d 288, 300-01 (E.D. Mo.), commented on the development of the method of merchandising gasoline through filling stations handling a single brand:

> "Another influence is that the companies have almost universally adopted trade-names for their products—particularly those for auto-

Simpson's brief boldly asserts (p. 26) that "The record * * * showed that the effect of the retail dealer consignment agreement program was to effectuate exclusive selling of gasoline at thousands of outlets." He gives no references to the record for this assertion, nor can he, for it is unfounded. It will be recalled that Union has 1030 dealers in California who are not its lessees but either own their stations or lease them from third parties, and that Union sold rather than consigned to 234 of these (R. 334). Yet none of these were "split pump" dealers; that fact could not be attributed to Union's leases and consignment agreements.

G. The claim of coercion.

We have seen (pp. 18, 19) that what Simpson calls "coercion" is simply the position taken by A that, if B wishes to contract with A or to acquire a leasehold in A's property, A will deal with him only on terms satisfactory to A. This kind of argument was denominated "absurd" in *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 493 (9 Cir. 1950), cer. den. 340 U.S. 830.

A refusal by one party to enter into a business relationship with another except on certain contract terms is not coercion. *Gummed Tape Co. v. Miller*, 155 F. Supp. 267, 271 (E.D. Pa. 1957). One who *chooses* to go along for business reasons cannot claim duress. *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155, 162 (E.D. Pa. 1960). Since, as said in *Agneu v. Parks*, 172 C.A.2d 756, 764, 343 P.2d 118, 123 (1959), "it is not actionable coercion or duress to threaten to do what one has a legal right to

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mobile use. Extensive, nation-wide advertising has taken place, with the design and result of creating a demand in the individual automobilist for a particular brand of gasoline or oil or both. * * *

* * *

"We have not attempted to state the many influences which have shaped nor to trace—except in veriest outline—the course of development of the industry. * * * *It is not of their making, and is beyond their control. It is a business current which they cannot successfully oppose. It cannot be ignored in judging their actions and the results therefrom.*"

do", *a fortiori* it is not coercion to refuse to enter into a contract.

Stripped of verbiage, Simpson's grievance is that he wanted to do business with Union but it refused to do business with him on *his* terms. He wished to occupy *its* real property and sell *its* gasoline but on *his* own terms. Union was not selling gasoline to lessees for resale. The only basis on which it cared to merchandise gasoline on premises owned by it was to sell its gasoline directly to the consumer by the agency of consignees. It so informed him, and he accepted the terms. This is not coercion.

Simpson talks about being deprived of "freedom of choice" (e.g., Br. 43). But "freedom of choice" means the right to choose between alternatives when one can take either but not both. It does not mean the right to have the best of both. A contract is a consensual matter. Simpson had a freedom to choose whether to become a Union dealer on terms agreeable to Union or, if those terms were not satisfactory to him, of not becoming a Union dealer. Freedom of choice to Simpson does not mean denial of choice to Union. Freedom to contract must be the freedom of both parties to contract on terms mutually acceptable. The antitrust laws have not made a gasoline refiner a public utility which must sell its gasoline and lease out its real property on terms thought by the dealer or by juries to be reasonable.

Marshall v. Packard-Bell Co., 106 C.A. 2d 770, 236 P.2d 201 (1951), affirmed a judgment on a demurrer to a complaint by one of defendant's distributors to recover contributions to an advertising fund; the court said (p. 774):

> "it is disclosed that the only fact alleged constituting duress was that defendant corporation threatened to deprive plaintiff of his exclusive distributorship in the event he did not make the contribution. . . . [I]t does not constitute duress or coercion to threaten to do that which a party has a legal right to do. [citations]
>
> "* * * defendant corporation had the right to terminate its distributorship contract with plaintiff at any time. Therefore

when it threatened to do so unless plaintiff made a contribution to the advertising fund, such threat did not constitute illegal duress or coercion, as defendant corporation was merely threatening to do something that it was legally entitled to do. *Hence plaintiff's contribution was made by him voluntarily.*"

In *Nelligan v. Ford Motor Co.*, 262 F.2d 556 (4 Cir., 1959), a judgment of dismissal was entered against a Ford dealer who sued Ford for $150,000 damages, claiming a violation of the antitrust laws in that Ford terminated the Sales Agreement in accordance with its terms because of plaintiffs' protest against and unwillingness to continue payments to an advertising fund. The plaintiffs' contentions were these (p. 556):

> "The complaint alleges that Ford's right to terminate a dealership at will on sixty days notice, together with other provisions contained in the agreements, permitted Ford to control and dominate the business of its dealers in violation of sec. 1 of the Sherman Act, and to coerce plaintiffs and other dealers into courses and methods of conducting business which they as independent businessmen would not otherwise have pursued. * * * [p. 557]
>
> * * *
>
> "Finally, plaintiffs argue that the cancellation of plaintiffs' sales agreements was the result of a coercive and unlawful conspiracy resulting from plaintiffs' protests against and unwillingness to continue to make the contributions to LMDA * * *." [p. 559]

Not only Simpson's contentions but his very words seem borrowed from those of Nelligan!

What Simpson's contention comes to is that the conjunction of a one-year lease and a consignment agreement has antitrust significance. To that subject we now turn. But if that conjunction does have antitrust significance, it must find its support in some other kind of reasoning than recourse to terms like "coercion", which is a desecration of straight thinking.

H. No illegality attaches to the conjunction of Lease and Consignment.

Neither legal reasoning nor economic reality can find illegality in the conjunction of lease and consignment. In the *West Coast Oil* case, *United States v. Standard Oil Co.*, 1959 Trade Cas. ¶ 69,399 (S.D. Cal. 1959), the Consent Decree requires each defendant to offer to its dealers both a supply agreement and a lease of premises occupied (Sec. XII(B)), and provides (Section XII(D), p. 75,532):

> "Each such agreement and each such lease may provide in substance or effect * * * (ii) that deliveries thereunder may be suspended and/or that it may be terminated by the defendant party thereto at any time prior to the expiration of its stated term, * * * *for the breach of any provision thereof* * * *. Where a dealer holds such an agreement and such a lease covering the same location each or either of them may provide in substance or effect that a breach of one shall constitute a breach of the other and/or that the cancellation or termination of one shall be effective to cancel or terminate the other.*"

And it will be recalled (pp. 43-44, supra) that a consignment agreement, such as Union's, is a "supply agreement" within the meaning of this decree. Section XII(D) is of interest as reflecting the views of the Department of Justice of what does not offend the Sherman Act.

Simpson's brief contains much on the law of "tying agreements". But nothing Union did involved a "tying agreement" either under Section 3 of the Clayton Act or Section 1 of the Sherman Act.[64] Nowhere did Union condition the sale or lease of any commodity, realty, or service on the purchase or lease of any other.

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64. Section 3 of the Clayton Act is not one of the statutes invoked by the complaint (R. 4, 46) or by the petitioner's brief (Br. 2). The tying arrangements proscribed by Section 3 relate solely to commodities, so that Section 3 could have no bearing on a lease of realty.

The fact—stipulated by Union for the purpose of its motion—that it would lease its realty only to one who would execute a consignment agreement—was not a tie-in within the meaning of any of the cases. By signing a consignment agreement a lessee did *not* agree to take *any* quantity of gasoline *at all* from Union, nor did he preclude himself from buying or handling the gasoline of anyone else. This we have seen (pp. 13, 20-22, supra). The consignment agreement merely specified the terms on which any gasoline the lessee saw fit to take from Union would be handled. In short, concurrently with leasing a station Union was informing the lessee that it would not be selling gasoline to him and that, if he should obtain gasoline from it, he would be doing so as an agent. After signing the agreement, he was still free to get his gasoline elsewhere.

Simpson's other point of attack is the supposition—also stipulated to as a fact for purposes of Union's motion—that Union would not give a *new* lease to one who had violated a consignment agreement, i.e., to one who, after obtaining gasoline from Union to handle as its agent, violated his instructions. This still is no "tie-in". It would seem to be a matter of common sense for a person not to enter into new contract relationships with another who has breached old contracts with him.

Simpson's discussion is difficult for us to follow, but it appears to contain an innuendo that Union would not renew the lease of one who had not obtained his gasoline from Union (e.g., Br. 43, 69). No such charge was made in the Amended Complaint (R. 46-59) or in Simpson's "Pretrial Statement for Pretrial Ruling" (R. 199-212), nor was any such fact stipulated to by Union. But were it to be assumed that this was the fact, there still would be nothing illegal. Before Section 1 comes into operation, there must be an *agreement*.[65] And a refusal of Union to give a new lease to one because

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[65] At this juncture we set to one side "combinations" and "conspiracies", for they are not here involved. As Simpson's counsel made his position clear (R. 395), "The central issue here is contracts in restraint of trade * * *"

during his expired term he had obtained gasoline elsewhere would not be an agreement at all. It has repeatedly been recognized and held that discontinuance of relations with another because he will not deal with the first party exclusively is not a tying agreement. It is the *absence* of any agreement. The grievance of the party cut off is not the existence of an exclusive dealing agreement but the absence of any agreement with him. But this is not illegal and no ground for recovery. *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952), cer. den. 345 U.S. 925; *Hudson Sales Co. v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821; *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879 (4 Cir. 1956); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959). The governing principle we discuss more fully in Part II below at pp. 90-97, where we show that the conduct is recognized as legal by *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

Not only is there, in such a situation, no agreement to which Section 1 can attach, but for Union to follow a practice of not giving new leases to dealers who had not handled a satisfactory volume of its gasoline would be neither a restraint of trade nor unreasonable. Union is not in the real estate business. It obtains the fee or possessory interests in service station sites in order to develop an outlet for its gasoline in fierce competition with numerous other refiners.[66] As said in Barber, "Refusals to Deal Under

66. Mr. Reese Taylor, Chairman of Union's Board (R. 441) testified that "any consignee or lessee of the Union Oil Company who did not meet our requirements as to operation of the station, presumably his lease would not be extended" but that if "in every way he was a satisfactory dealer, certainly I think his lease would be extended." (R. 450-2). We submit that a more reasonable position cannot be imagined.

It may be noted, in passing, that Simpson's brief incorrectly summarizes this testimony as being that it was Union's "policy * * * to renew its one year lease on a continual basis with all those who do follow Union's policies" (Br. 26, 68).

Antitrust Laws", 103 U. of Penn. Law Rev. 847 at 859 (1955):

> "* * * common sense compels the conclusion that a producer should remain free to discontinue business relations with individual distributors or dealers who are not doing an effective job of selling, whether this ineffectiveness results from business ineptitude or from the fact that the dealer has diluted his efforts by handling competing lines, or the fact that his activities derogate from the public good will attaching to the producer or his product. It is the essence of competition that the manufacturer or wholesaler should and does have wide freedom in maintaining the quality of his distribution system."

If Union monopolized the gasoline business or service station sites, or if its refusal to give a new lease to one whose term had expired excluded him from business, it might be that another kind of problem would be involved. But, as we have seen, none of these things were so. Union had a property interest in only 1335 service stations in California. Nearly that number (1030) of Union dealers in California (see p. 5, supra) owned their own stations or leased them from lessors other than Union. And there were 20,000 other stations obtainable from innumerable other lessors and refiners. Within 30 days after leaving the Union station, Simpson had a General Petroleum station in Fresno (see p. 12, supra).[67]

If a rule were to be declared that a refiner who has stations to lease must continue to lease to one handling a competitor's gasoline, one of two consequences must follow. Either the refiner will have to cease leasing to anyone and operate all its stations through its own employees, or it will have to cease possessing sta-

67. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6-7 (1958), this Court said:

> "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

tions entirely. But if this economic consequence is socially desirable, it is for Congress to declare it, and Congress has not done so. It cannot be spelled out of the Sherman Act.

The Richfield case.

Simpson discusses *United States v. Richfield Oil*, 99 F.Supp. 280 (S.D. Cal. 1951), at length (Br. 58, et seq.) and repeatedly cites and relies on it as supporting his contention that the conjunction of a one-year lease and consignment was illegal. *Richfield* does not support him. The court explicitly pointed out that the dealers there were *not* consignees (see p. 46 supra). They were purchasers, and the essence of the case was an admitted oral agreement between Richfield and the dealers to handle its products exclusively.[68] The court did *not* require even as much as one-year leases. It simply held that leases, although purporting to be terminable on 24 hours' notice, could not be so terminated because they provided for 30-day rental (p. 287, 1st col.) and therefore under state law they were actually 30-day leases (pp. 286; 290, 2d col.; 297). In consequence they could be terminated only on a 30-day notice.[69] Union's one-year lease gave its lessees not less, but 12 times as much tenure as the *Richfield* decision gave Richfield's lessees.

I. The case as a whole.

In the foregoing pages we have examined every aspect of Union's conduct to see whether it violated the antitrust laws. It

68. "The problem is simplified as to the L-O stations by the Richfield admission that the oral understandings under which the leases are made, and for the violation of which the leases are forfeited under the 24-hours' termination clause, to be referred to, not only provide but demand that Richfield petroleum products and Richfield-sponsored TBA products be handled exclusively and without deviation." (99 F. Supp. at 286)

69. "The 24-hours' termination clause is invalid, against public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reserved, one month." (99 F. Supp. at 297)

has been said that the various factual components of a case should not be compartmentalized. While this has been said only in respect of ascertaining whether a conspiracy existed,[70] and this case involves no conspiracy, we now submit that, everything added together, there still was no violation of law. Here is not a series of bricks making up a wall. Here is a sum of zeroes, which is still zero.

The case is this: Union appointed agents to sell its gasoline at its prices, leased its realty to its agents, and, when one agent's lease expired, refused to give him a new lease because he had been a faithless agent. The Sherman Act has nothing to do with this set of facts.

III.

SIMPSON HAS SUFFERED NO ACTIONABLE DAMAGE

We have submitted that Union did not violate the Sherman Act. The Court of Appeals did not decide that question, because it concluded that it was unnecessary to reach it, for even if Union had done so, "it appears clearly on the record that Simpson suffered no actionable damage" (R. 565). In this conclusion we submit that the court was correct. As it stated (R. 569-70):

> "It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be present only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust laws, but show also the impact of the violations upon him and damage to him resulting from the violations of the antitrust laws."

This is elementary, expressly stated in Section 4 of the Clayton Act. *Wolfe v. National Lead Co.*, 225 F.2d 427 (9 Cir. 1955), cer.den.

70. *Continental Ore Corp. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

350 U.S. 915; *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1 Cir. 1961), cer. den. 368 U.S. 931.

Simpson argues that no requisites to a plaintiff's right to sue under Section 4 of the Clayton Act may be imposed "beyond what was specifically set forth by the Congress" (Br. 53). This is true, but irrelevant, for one of the two basic requisites Congress *did* impose is that the plaintiff "has thereby suffered injury" as the result of the violation. *Radovich v. National Football League*, 352 U.S. 445, 453 (1957). A violation of the antitrust law is not a treasure trove into which any passerby may dip for a reward. The particular violation must be the cause of the supposed damage before there may be recovery.

We test the two claims of damage (pp. 9, 10, supra) against this principle.

A. Simpson may not recover damages for alleged inability to charge what he wished for gasoline while he was a consignee: the claim for $1000.

Simpson's first claim of damages is that while he was a Union consignee he lost $1,000 from *inability* to charge as much as he wished for gasoline (p. 10, supra). The predicate of the claim is that the Consignment Agreement was unlawful (see p. 12, supra). But assuming that it was, one of two conclusions must follow.

1. THE PRICES AT WHICH SIMPSON SOLD WERE HIS VOLUNTARY ACT.

If the consignment agreement were unlawful, the Attorney General could have sued to enjoin it or could have, within the period of limitations, prosecuted Union criminally,[71] or Simpson could have rescinded the agreement, or simply refused to adhere to it; if Union had sued to enforce the agreement, illegality would have been a complete defense. *Bement v. National Harrow Co.*, 186 U.S. 70 (1902); *Continental Wall Paper Co. v. Louis Voight &*

71. Simpson's remark (Br. 42) that "private agreement does not erase the violation" is thus pointless.

Sons Co., 212 U.S. 227 (1909). If Simpson in fact charged less or more for gasoline than he now says he preferred to do, *his conduct was his own*, and any damages flowing therefrom flowed from his voluntary act, for which he cannot recover damages. *Alexander v. Texas Company*, 165 F. Supp. 53, 61 (2d Col.) (W.D. La. 1958).

Simpson in fact exercised the power to charge whatever he wished. The amended complaint alleges (¶ 23, R. 55-56) that,

> "On or about March 1958 * * * plaintiff, after requesting authorization from defendant which was refused, lowered his price to 27.9¢. The stipulated consignment price, however, had been set at 29.9¢ by defendant",

and the Amended Complaint limited the period of Simpson's alleged inability to set prices to the time *prior* "to March 1958". His brief in this Court avows that he "thereafter continued to establish market prices of his own judgment" (Br. 34). Yet it is self-evident that since Simpson was able, from March to June 1958, to charge prices other than those authorized under the agreement, *he was able to do so at any other time*. And this he repeatedly did, as he testified (R. 313):

> "Q. * * * And when you were putting those prices on the pumps, were the prices that you were putting on higher or lower than the prices authorized?
>
> "A. Both cases.
>
> "Q. And were you arriving at those prices that you were putting on the pumps through the exercise of your own business judgment?
>
> "A. Yes."

As the Court of Appeals said (R. 572), Simpson's "action in March 1958 demonstrates that he was not unable to fix prices on gasoline * * *. [W]hen his claim is based on an alleged *inability* [italics in original] to change the situation and his own action shows the ability we think his claim fails." To the same legal effect, *Shasta*

Douglas Oil Co. v. Work, 212 A.C.A. 640, 28 Cal. Rep. 190 (1963).

What Simpson's legal position amounts to is this: where A agrees with B to perform a certain line of conduct and from time to time does so, he can then recover treble damages from B on the theory that B could not have compelled him to perform the contract for illegality under the Sherman Act! *No case has ever so held*, and the contention is contrary to common sense, common fairness, and elementary law. A party, tendered an illegal contract, should decline to enter into it, or, having entered it, he may seek an adjudication that it is not binding on him. Alternatively he may simply ignore it and, if sued, set up illegality as a defense. *He cannot, however, observe the contract and then recover treble damages for having done so. Ring v. Authors' League of America*, 186 F.2d 637 (2 Cir. 1951), cer. den. 341 U.S. 935.

The doctrine, *volenti non fit injuria*, is elementary in the law. As expressed in Cal. Civ. Code § 3515, "He who consents to an act is not wronged by it." Here, the applicable principle is even stronger: He who *does* the act is not wronged by it. He may not charge another for what he himself has done.

In *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801 (S.D. Cal. 1959), plaintiff sued in two counts, one under state law and the other under the federal Automobile Dealers Act, for damages for termination of a dealership. Judge Yankwich held for defendant. He said (p. 810):

> "To conclude: Pinney is seeking to recover, in tort, for a voluntary act on their own part which ultimately resulted in the liquidation of their automobile agency. The Civil Code of California [C.C. 3515] declares: 'He who consents to an act is not wronged by it.' This is a codification of the maxim *volenti non fit injuria, which is a basic tenet of our jurisprudence*. It precludes the maintenance of an action for a wrong by one who has "consented to the act' which has occasioned his loss' ". Its application to the facts in this case would, of itself, call for denial of recovery."

In an attempt to answer the obvious conclusion, Simpson argues that the doctrine of *pari delicto* is inapplicable (Br. 46, et seq.), and he cites cases that relate to that doctrine or to the doctrine of "unclean hands". But the doctrine of which we speak is neither of these.[72] The "unclean hands" doctrine is one of fastidiousness and denies access to court to one whose hands are themselves unclean, either because of participation in the same wrong as defendant or in another and related wrong abhorrent to the court, and it has been applied in the antitrust field. *Singer v. A. Hollander & Son*, 202 F.2d 55, 59, 60 (3 Cir. 1953) (per Goodrich, J.). The doctrine of "*pari delicto*" is a refusal to entertain the grievance of one participant against another in a wrongful scheme, even though the claim is for damage inflicted *by* the one *on* the other. It may be that either doctrine may give way to superior considerations of public policy, so that the one may be permitted to recover for damage *caused by the other*. But the instant case turns on the fact that the alleged damage to Simpson was not caused by Union. What Simpson charged for gasoline he did himself.

Consequently the cases cited by Simpson (Br. 46-48) are not in point. A plaintiff will not be denied recovery because of the unclean hands of having been or being engaged *in some other or collateral* illegal conduct, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).[73] Or, *after* one withdraws from a conspiracy, he will not be barred from recovering treble damages *thereafter* inflicted on him by the other conspirators by the con-

72. At Br. 10 Simpson states that Union's answer to the complaint pleaded *pari delicto*. Our answer does not use that term (R. 94).

73. In the *Mead* case plaintiff was damaged by defendant's illegal price-cutting and was not to be denied relief because plaintiff theretofore had participated in an illegal boycott against defendant. In *Kiefer-Stewart* plaintiff was damaged by being denied a supply of goods by a conspiratorial boycott of vendors and was not denied relief because plaintiff had theretofore itself been in a price fixing conspiracy.

tinuance of the conspiracy. e.g., *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2 Cir. 1939).

But what one himself does merely because he saw fit to do so pursuant to an agreement he now says is illegal he cannot charge to the other. *Pennsylvania Water & P. Co. v. Consolidated G. E. L. & P. Co.*, 209 F.2d 131 (4 Cir. 1953), cer. den. 347 U.S. 960 (1954). In the case just cited a contract between plaintiff and defendant provided that plaintiff could not make an extension to its plant without defendant's consent, and defendant refused consent to a requested extension. In the course of litigation it was declared that the contract was in violation of the antitrust laws. In a later action plaintiff claimed that "by reason of the enforced delay [in the extension of the plant] it suffered damages * * * caused by the increased cost of construction, the increased cost of financing, the loss of earnings and the expense of litigation" (p. 133). A summary judgment for the defendant was affirmed; the delay in making the plant extension was plaintiff's own act. While the court expressed its reasoning in terms of *pari delicto*, the result, we think, could have been better expressed in terms of *volenti non fit injuria* or causation. The reasoning of the court, moreover, shows that it is a vast overstatement to say that *pari delicto* has no place in the antitrust field. *Pari delicto* does apply where at the very time of the alleged damage the plaintiff and defendant are parties to the very illegal agreement on which the suit is based. The court said (pp. 133-34):

> "We are in accord with the * * * District Judge * * * that Penn Water is precluded from recovery in this case because it was a party to the illegal agreement upon which it now bases its claim to recover under the anti-trust acts. Penn Water contends that the doctrine of *in pari delicto* is no longer a defense to a private action for damages growing out of an anti-trust violation but has been rejected by the recent decisions of the Supreme Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219

* * * *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, * * * and *Moore v. Mead Service Co.*, 340 U.S. 944 * * *.

"We do not so understand these decisions, *for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based.*

"We are satisfied that it was not the intention of the Supreme Court to overrule the doctrine firmly established in earlier cases."

In *Davidson v. Kansas City Star Company*, 202 F. Supp. 613 (W.D. Mo. 1962), plaintiffs, independent contractors for delivery of newspapers, contracted with the Kansas City Star to deliver its paper and agreed not to sell or deliver the papers of others. They were denied recovery of damages, for their refraining from delivering papers of others was their own act.[74]

Assuming that the consignment arrangement was unlawful, Simpson could *not* have been compelled to charge prices he did not desire. He exercised his volition to charge those prices. We know, of course, his excuse, that he did so because he feared Union would not renew his lease when it expired. But this is not a valid retort. As we show in Part B (pp. 89 et seq., infra), Union was under no duty to deal with him. If he elected to adhere to the consigned prices, he did it for what he thought was greater advantage to himself, and the act was still his free act. See *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155, 162 (E.D. Pa. 1960).

74. See also *Louisiana Petroleum Retail Dealers, Inc. v. Texas Company*, 148 F. Supp. 334 (W.D. La. 1956), and *Temperato v. Horstman*, 321 S.W.2d 657 (Mo. Sup. Ct. 1959). Denying damages to one of the parties to a vertical price fixing agreement illegal under the state antitrust laws, the court said (p. 666):

"* * * we shall not permit the active participants in a forbidden contract to recover damages, treble or otherwise, against the other party on account of the very act of illegality in which they themselves have engaged."

2. IF THE CONSIGNMENT AGREEMENT WAS ILLEGAL, THE GASOLINE WAS STILL UNION'S PROPERTY AND SIMPSON HAD NO RIGHT TO SELL IT AT ALL.

There is another obstacle to recovery. A declaration by a court that an arrangement existing between the parties is illegal does *not* create a *different* agreement between them. A court may outlaw a contract, but it cannot supplant it by another of its own creation, which the parties did not make. If denied the right to market its gasoline by consignment, Union would still be free to decide what dealers it might wish to sell to, to decline to sell to any particular person or to any and all, and instead to sell to the consumers through its own employees. As for any gasoline entrusted to Simpson, he would merely have been in possession of *Union's gasoline* without any right of disposition whatever.

Nor can this fatal objection to recovery be obviated by treating the consignment agreement as one of sale and purchase, for the contract states no purchase price payable by the dealer to Union. The only way damages could be calculated would be by finding the margin between the price at which a dealer could resell and the price at which he could buy. But there was no price at which Simpson bought or could buy. This leads to a third obstacle.

3. THE FACT OF DAMAGE IS SPECULATIVE.

The gist of the foregoing discussion is that Simpson suffered no damage caused by any illegal act of Union. An additional deficiency is that the *fact* of damage is purely speculative. While great leeway is given a plaintiff in an antitrust suit in proving *amount* of damage, *no room for speculation is permitted* in establishing the *fact* of damages. *Flintkote Company v. Lysfjord*, 246 F. 2d 368, 392 (9 Cir. 1957), cer. den. 355 U.S. 835, and there must be a rational basis for approximating an amount, as shown by Judge Friendly's lucid opinion in *Hermann Schwabe v. United Shoe Machinery Corp.*, 297 F.2d 906 (2 Cir. 1962), cer. den. 369 U.S. 865.

The claim for $1000 is based on the assumption that during his dealership with Union Simpson could have sold the same amount of gasoline as he did at higher prices, and it rests on a computation entitled "Supposing I Could Have Increased My Margin ½¢ Premium and 1¢ Regular," arrives at $1,034.02 (see p. 10, supra). This "supposing" is pure conjecture; it is rank speculation that he could have increased his return by charging either more or less than he did. Profits depend on many factors; the quantity sold is as important as the price charged. An increase in price may mean a decrease in volume; lower per unit price may mean greater profit, not less. Striking the right price is the art of merchandising. A jury may not become the "merchandiser" retroactively and speculate what prices, day to day, would have been most productive or "suppose" whether Simpson's "margin" could have been increased.

The claim is pure guess. Simpson testified (R. 316):

"Q. Then you would have charged a penny a gallon more for each grade of gasoline than you actually did?

"A. *Possibly.*

"Q. Well, would you or wouldn't you have?

"A. I didn't have the opportunity.

"Q. If you had had the opportunity, what would you have done?

"A. *That is guessing.*"

No decided case supports the recovery sought. Where, by conspiracy, one has been wholly deprived of a source of supply of goods or denied access to the customers, the fact of some damage follows, albeit the amount may be problematical. This is the kind of situation with which the cases ordinarily deal. But the fact that a given resale price is required (if it be a resale price) has not the slightest tendency to show that, were it not required, the reseller could sell at a different price, or, if so, make a different profit. *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1 Cir. 1961), cer. den. 368 U.S. 931.

B. Simpson may not recover damages for Union's refusal to give him a new lease: the claim for $150,000.

Simpson's second claim of damages—for $150,000—is that he was unable to obtain a lease from Union. While he includes, in this sum, damage from inability to sell "his proprietary interest as a lessee" to a successor of his own choosing or to sell his "good will" or to obtain the fair market value of "his business", these are but another way of phrasing the claim that he had a proprietary interest as lessee despite the expiration of his one year lease (p. 11, supra). The cardinal fact here is that the cause of this item of "damage" was *not* the consignment agreement or lease, however illegal they are assumed to be, but simply Union's refusal to give a new lease.

It is elementary that a plaintiff cannot recover under the Sherman Act except for deprivation of "a legal right". *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922); *Maltz v. Sax*, 134 F.2d 2 (7 Cir. 1943), cer. den. 319 U.S. 772. One cannot recover damages in an antitrust case for deprivation of something he does not own. *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 193 (9 Cir. 1956); *Whiteley v. Foremost Dairies, Inc.*, 151 F. Supp. 914, 924, 925 (W.D. Ark. 1957), aff'd 254 F.2d 36 (8 Cir. 1958). Unless Union was under a legal duty to lease to Simpson for some period of time, that is, unless Simpson had a legal right to continue to possess Union's property, he can recover nothing for its refusal to do so.

State law governs the right to an estate in real property, and on the expiration of his one-year lease, Simpson had no right in California law to a further estate. This very issue of whether Simpson had any right to tenure is *res judicata*, because in Union's unlawful detainer action against Simpson in a California State court judgment was entered adjudicating that at all times after midnight May 22, 1958, Union was entitled to possession of the property (see p. 7, supra). The alleged right to continue in possession was the

very issue in the state action. That judgment estops Simpson from claiming any such right now. *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695 (7 Cir. 1947), cer. den. 332 U.S. 810; *Singer v. A. Hollander & Son*, 202 F.2d 55 (3 Cir. 1953); *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464 (3 Cir. 1950), cer. den. 310 U.S. 639. While the judgment of the State Court neither could nor did decide any federal antitrust questions, it is conclusive on the parties in this case that, under state law Simpson had no right to further possession, tenure or estate. That is part of the factual subject matter on which the federal antitrust law must operate.

The essential question, therefore, is whether federal antitrust law somehow imposed on Union a duty to do what State law did not require, viz., to lease its property to him for a further term after May 22, 1958. What Simpson seeks is more than a declaration that his consignment contract was illegal. *That* is a moot issue, for that contract has been dead and past since May 1958. By seeking damages he seeks a substitute for retroactively compelling Union to lease to him. This it could not be compelled to do, whatever its reason for refusal may have been.

There is a simply enormous body of law that one who is in the business of selling merchandise may discontinue selling to another for any reason whatever. Even if Simpson here had *owned* his own place of business and had been *buying* gasoline from Union, and Union had then refused to sell him further, that body of law would deny him recovery of damages. As said in *Schuting Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, at 902 (D. Md. 1956), affirmed on the opinion of the District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823, a Sherman Act case involving a refusal to renew a dealer's one year contract:

> "* * * unless his contract so provides, a dealer once appointed has no tenure, no right to renewal of his contract" (p. 903).

The *Schwing* case was followed in *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957), where the contract was also for one year, with no option of extension, despite "the custom in the business to extend contracts, from year to year, 'barring some reason for cancellation.' " (243 F.2d at 419.)

But even were courts to begin to whittle away at the settled body of law that one can discontinue *selling* to another for any reason, Simpson could not recover, for *here the question is whether one can be compelled to lease real property to another.* We submit that the Court of Appeals was correct when it said "* * * courts may not fashion a new lease for Simpson * * *. Simpson's tenure ended on May 22, 1958" (R. 570). **Suppose, when Simpson first sought a lease from Union in 1957, he had declined to accept a consignment arrangement and so was denied a lease. Could he have compelled Union to lease the property to him on a theory that consignment was illegal, or could he have sought damages for refusal of Union to lease to him? Obviously not!** Certainly his rights were not enlarged by the fact that he did enter into the consignment arrangement for a space of time. He did not thereby acquire a right to still further leases.

The fact that Union's reason for refusing to give Simpson a new lease was his unwillingness to follow price direction, as shown by his past conduct, is irrelevant. Much has been written about the *Colgate* doctrine, but, no matter how confined it has been, the last word on the subject is *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and that case recognizes this principle as basic: Absent monopoly, one party may unilaterally refuse to deal with another for failure of that other to follow a course of conduct which it would be illegal to bind him to by mutual agreement. In the *Parke Davis* opinion this Court repeatedly recognized that a manufacturer may legally *refuse to have business relations* with one who fails to sell at prices satisfactory to or suggested by the

manufacturer, and that he may so inform the buyer.[75] The Court recognized that Section 1 of the Sherman Act is cast in the form of prohibitions of certain *means and methods*, viz., conspiracy, having certain economic consequences, but does not prohibit the consequences themselves when not achieved by the prohibited means. Thus, it said (p. 44):

> "The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.'"

The manufacturer may rely on the individual self interest of another in avoiding termination of business relations, to bring about acquiescence in its policy (p. 47). There are writers who would like to see the Court go beyond *Parke Davis* and limit *Colgate* even further by holding that if, in consequence of the manufacturer's announcement, a vendee does acquiesce in its policy and conform to it, an "agreement" is thereby formed.[76] But even these writers acknowledge that if the manufacturer goes beyond the announcement to an actual refusal to deal, there is no violation of the antitrust law, for the self-evident reason that "the re-

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75. E.g., the passages quoted at pp. 63, 64, supra.

76. The Court did not so hold in *Parke Davis*. As said in a recent decision of the Ninth Circuit, *Walker Distributing Company v. Lucky Lager Company*, 1963 Trade Cas. ¶ 70,886 (Sept. 1963), "We feel obliged to assume that the report of the demise [of the *Colgate* doctrine] is premature." (p. 78,562)

fusal indicates that there has been a failure to obtain agreement."[77]

The cases are therefore numerous and uniform that one may legally refuse to deal with another, even though his reason is that other's refusal to enter into an unlawful agreement. *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954). In *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952), cer. den. 345 U.S. 925 and *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821, the defendant refused to deal further with the plaintiff because the latter refused to accede to demands not to handle competitive merchandise. In the *Nelson* case, the court said (p. 915):

> "There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with any one for reasons sufficient to himself."

In the *Hudson* case, the court points out (p. 274):

> "Plaintiff had no tenure, *no right to a renewal* of his contract as master dealer. Defendant, on the other hand, *had an absolute right either to renew or not to renew it*, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown * * * that the defendant had done so only because plaintiff had refused to give up in the future his other agencies * * *."

In *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959), defendant, a nationwide distributor, refused to sell further to plaintiff retailers because they handled goods in competition with defendant's lines. Dismissal of the complaint was affirmed, the court saying:

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77. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. Law Rev. 655 (1962), particularly at 686 and 704.

"Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer *for any reason or with no reason whatever.* Thus, the courts have until now not held a seller liable in damages *for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement* or an exclusive dealing arrangement. * * *

* * *

"Neither in terms nor inferentially does the statute prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this * * * [Citations omitted] [p. 337].

* * *

"* * * There is no dispute about the fact that it was Western Auto's policy to have its associated retail stores push its own products and that it frowned upon their handling of competing goods. Plainly enough Western Auto wanted its dealers to advance sales of its merchandise, and threatened with cancellation and actually cancelled dealers who patronized its competitors to an extent which it felt jeopardized the value to it of the franchises issued to associated stores. But * * * it exacted no agreement against the handling of competing merchandise." [p. 338]

Osborn v. Sinclair Refining Co., 286 F.2d 832 (4 Cir. 1960), cer. den. 366 U.S. 963, cited by Simpson (Br. 50) was a decision of the same court and the same judge as *McElhenney*. The plaintiff had been a dealer and lessee of defendant and had his lease cancelled. He sought damages, claiming that defendant engaged in an illegal tying arrangement. The District Court had held there was no tying agreement. The Court of Appeals held that

under the findings of fact there was, that it was illegal, and that "Osborn's failure to abide by this arrangement or condition contributed to the cancellation of his lease" (p. 840). It then expressly refrained from holding that plaintiff could recover damages and said (p. 840):

> "* * * there are questions concerning Osborn's recoverable damages. * * *
>
> "Since Sinclair-Sherwood had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable as damages resulting from the violation of the anti-trust laws. * * *
>
> "Of course, if Osborn sustained no damages that are properly recoverable, he has no cause of action."

Since "there [was] evidence in the record" of other items of damage (p. 840) and the District Court had not passed on any question whether there was recoverable damage, the Court of Appeals remanded the case for consideration of that question. Thereafter the District Court held that damages flowing from the cancellation were not recoverable. *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856 (D. Md. 1962).

In *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2 Cir. 1962), plaintiff sued for treble damages under Section 4 of the Clayton Act. The District Court issued a preliminary injunction requiring defendant to continue doing business with plaintiff during the pendency of the suit. Reviewing *Colgate* and *Parke Davis*, the Court of Appeals reversed, saying (p. 870):

> "* * * Assuming as we do that the proof warranted the inference that Simplicity's action was motivated by Materials' prosecution of the treble damage action, appellant has done nothing except exercise its right to terminate the contract in accordance with its terms. * * *
>
> * * *

"* * * Here, Simplicity and its customer voluntarily entered into a contractual relationship and agreed to transact business for a limited period of time. In the course of that business, Simplicity may have discriminated against Materials in violation of the Clayton Act * * *. Materials maintained that it did suffer an injury and it brought a treble damage action to compensate for it and to recover the statutory penalty. Meanwhile the initial term of the contract between Simplicity and Materials was about to expire. It is true that the contract was subject to automatic renewal, if no one desired to cancel. But, Simplicity, for reasons it thought sufficient, decided to terminate and gave the required contractual notice of such termination. [p. 871-72]

* * *

"Finally, we believe that the injunction cannot be sustained on the theory that Simplicity's refusal to deal constituted a tort. * * * In this connection, it generally has been held that 'fundamental assumptions in free business enterprise,' including the belief that 'each business enterprise must be free to select its business relations in its own interest,' may justify or excuse the act of one who causes harm to another as a collateral consequence of his refusal to continue a business relation terminable at will. 4 Restatement, Torts, § 762, and comments a, b and c; Green v. Victor Talking Machine Co., supra; at p. 382 of 24 F.2d; Prosser, Torts, § 107 (2d ed. 1955); 1 Harper & James, Torts, § 6.13, p. 521 (1956); and see cases cited in Handler, Cases on Trade Regulation (3rd ed. 1960), p. 272, n. 2."[78] (p. 872-73)

Alexander v. Texas Company, 165 F. Supp. 53, 62 (W.D. La. 1958), is directly in point. There plaintiff's service station lease was cancelled because he refused to sell gasoline at prices "fixed"

78. In *Bergen Drug Company v. Parke, Davis & Co.*, 307 F.2d 725 (3 Cir. 1962), the Third Circuit enjoined a defendant from discontinuing business with a plaintiff during pendency of suit brought under the Clayton Act, but it did so because the "gravamen of the main claim is * * * monopolizing and attempting to monopolize which, of course, is unrelated to the resale price maintenance policy involved in Colgate." (p. 727, 2d col.)

by the defendant. Granting a summary judgment for defendant, the court said that "Texaco's termination of plaintiff's lease was entirely lawful"; it "did not violate Section 1 of the Sherman Act because a *unilateral* refusal to deal is not inhibited" by Section 1, which applies only where there is a " 'contract, combination * * * or conspiracy' ". It did not violate Section 2 because no monopolization claim would hold up. Furthermore, "[p]laintiff has not alleged any recoverable damage proximately caused by the claimed Sherman Act violation" because the

> " 'damages he claims * * * are computed on the basis of alleged profits he anticipated realizing through continued operation of the service station over a three-year period. Necessarily, this assumes a legal right which did not exist, for by the terms of the lease defendant legally could have cancelled it at the end of any lease-year, as was done. Consequently, the damages he claims for this are purely speculative and are not founded upon any enforceable right.' "[79] (165 F. Supp. at 63.)

The essence of the matter is that Congress has not yet seen fit to make the manufacturer a public utility. As said in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2 Cir. 1962), at 871:

> "Indeed, when Congress enacted the Clayton Act, it rejected a provision which would have prohibited arbitrary refusals to sell because it was being projected into a field of legislation 'untried, complicated and dangerous' [citing Sen. Rep. No.

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79. A California case under the State Antitrust Act, *A.B.C. Distrib. Co. v. Distillers Distr. Corp.*, 154 C.A.2d 175, 191, 316 P.2d 71, 81 (1957), is similar. Plaintiff sued for refusal of defendant to renew a distributorship the term of which had expired, and argued that several provisions of the distributor agreement were illegal. First declaring that the same principles governed State antitrust actions as federal, the court denied recovery, saying that it was immaterial whether provisions of the expired agreement were illegal as "designed to prevent plaintiff from purchasing and selling the products of other manufacturers, competitors" of defendant or as a punitive and unlawful covenant running with the goods.

698, 63rd Cong., 2d Sess. 44 (1914).] * * * we cannot justify through improper judicial 'interpretation' of a section of the antitrust laws what amounts to an extension of the remedies given by Congress under the Sherman and Clayton Acts."[80]

Directly in point is *Dart Drug Co. v. Parke Davis & Co.*, 1963 Trade Cas. ¶ 70,906 (D.D.C., September 27, 1963) where summary judgment was granted defendant.

Appellant's citations are not in point.

We have considered some of Simpson's citations above. The essence of the remainder on the subject is that they are cases either (1) of conspiracies to refuse to deal or (2) refusals of a monopolist to deal. Thus *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), *Ford Motor Co. v. United States*, 335 U.S. 303 (1948), *Ramsay Co. v. Associated Bill Posters*, 260

80. The court, in the *Simplicity* case, also referred (in fn. 8) to its earlier decision in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 48-49 (2 Cir. 1915), where it had said:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' Cooley on Torts, p. 278. * * *

"Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet reached the stage where the selection of a trader's customers is made for him by the government.*"

U.S. 501 (1923), are all conspiracy cases. Where one refuses to deal with another in effecting a conspiracy, he is not exercising his own will but the will of the conspiracy, which is illegal. From the beginning this Court has consistently drawn the line between a unilateral refusal and a conspiratorial one. *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924). The case of *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7 Cir. 1959), involved neither consignment nor refusal to lease property. It was a case of a wide horizontal conspiracy between Gemex, a manufacturer, and all wholesalers who purchased from it, not only to fix the price at which they would sell what they bought from it but to fix the prices at which each would sell "products competitive to the Gemex line" (p. 2).

In *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), Eastman had acquired a monopoly of the goods in question and by refusing to sell to plaintiff had, in view of the monopoly, cut off all source of supply (see, e.g., pp. 368, 369). The right of one to refuse to deal does not exist in a monopoly situation, *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951),[81] because the refusal effectuates the monopolization, which is illegal.

THE DISTINCTION BETWEEN PRIOR LESSEES AND ONE IN SIMPSON'S SHOES

The Court of Appeals suggested, although it did not hold, that there might be a distinction between the case of one who had been a Union lessee before Union adopted the consignment method of marketing and the case of one like Simpson, who had not theretofore been a lessee but became one knowing that he

81. In the *Lorain* case the Court said:

"*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

had to be a consignee (R. 571).[82] For the reasons discussed above we think that neither type of lessee has a right to recover damages for refusal of the landowner to give a new lease. But certainly the court below was right in denying recovery to one such as Simpson, who obtained a lease on certain conditions and then violated them. *The lessor here did not try to cancel the lease but patiently suffered the running of the term.* Neither law nor morals require that it then give a new lease.

But because of the suggested distinction between a lessee such as Simpson and previous lessees, Simpson's brief debates the question whether "consent" will bar a private suit for damage under the antitrust laws. No such general question, however interesting, is involved in this case or in the reasoning of the Court of Appeals. What Simpson consented to was the lease and consignment. But they did not cause the claimed damage. During their existence he could have repudiated them, if they were illegal. Even so, while repudiating them, he could not continue to exercise rights he had acquired from them, as shown by the reasoning of *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951) (Learned Hand, J.), cer. den. 341 U.S. 935. Ring was denied damages on the ground that he had no interest in the property he claimed, for the reason that "the contract, by which he obtained whatever interest he did obtain, was unlawful because it was part of the unlawful conspiracy" (p. 641):

> "The plaintiff repudiated it for that reason; but he was not free to repudiate it in part, keeping the right to 'produce,' and rejecting the conditions which the authors had imposed

82. The Court said:

"Simpson is therefore not in the position of lessees who had been operating stations under leases from Union and who may or may not have been forced or compelled to sign a consignment agreement as a condition for renewal of their lease. * * *

"* * * We do not pass on the question as to these lessees. But Simpson was coming into the leasing business fresh. He had no former lease agreement."

upon their promises * * *. It follows that the judgment was right in holding that the plaintiff had no interest in the play, if we assume that the 'Agreement' was part of an illegal combination or conspiracy * * *." (p. 642)

Simpson's business as a dealer was created by the very documents he now challenges as illegal. *Until the lease and the consignment agreement he never was, and without them he never would have been, a Union dealer.* As observed in *Walder v. Paramount Publix Corp.*, 272 F.2d 349, 351 (2 Cir. 1959), cer. den. 362 U.S. 952:

> "Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully."

It would be one thing to say that consent does not bar damage inflicted. It would be quite another to say that, while successfully repudiating an arrangement on the basis of illegality, one can nevertheless keep it alive for its specified duration for such advantage as it offers him. The rationale of the *Ring* decision is that one may not voluntarily put himself into a position or relation, then claim it to be illegal and yet insist on having continuing and subsequent rights to operate under it. *But Simpson's case is even weaker than that.* Here the duration of the lease and consignment ended by their terms and the efflux of time. Simpson cannot claim a right to a new lease by virtue of the fact that for a season in the past he had been a Union dealer solely by force of a now expired lease and agreement which he now claims were illegal. This, we submit, is self-evident.

IV.

THE REQUISITE INTERSTATE COMMERCE OR EFFECT THEREON IS ABSENT

Unquestionably Union engages in interstate commerce. Since service stations in states other than California sell Union's gasoline on consignment, the necessary jurisdiction would be present in a suit by the Attorney General and, doubtless, in a suit by a service station dealer in another state.

But that is not the question here. The fact that a defendant engages in interstate commerce does not mean that everything it does falls within the federal jurisdiction in an antitrust suit. *Page v. Work*, 290 F.2d 323 (9 Cir. 1961), affirming a summary judgment for defendants in a private antitrust case for lack of jurisdiction.

The federal antitrust laws attach, indifferently, to activities that affect interstate commerce even though the activities are purely local, and to interstate activities despite the fact that the impact is purely local. But here both the impact and the activities causing the impact were purely local. The pertinent issue on interstate commerce in this case is whether the acts *injuring Simpson* were either in or affected interstate commerce. His operations were not in interstate commerce, for the operation of a retail service station is local. Pursuant to contracts made in California, between two citizens of California, Simpson leased a parcel of California real estate. No interstate commerce is involved in real estate. *United States v. Real Estate Boards*, 339 U.S. 485, 488 (1950), and a refusal to lease real property is not an act in interstate commerce. Union delivered to the leased premises gasoline refined in California which had never been outside California (R. 38). This gasoline was then sold at retail in California. Simpson's station sold 12,500 gallons per month (R. 322), a microscopic quantity when compared even with such a small area as Fresno, where over 3.5 million gallons were sold monthly (R. 16). Such

activities have no effect whatever on interstate commerce. Directly in point is *Alexander v. The Texas Company*, 165 F. Supp. 53, discussed at pp. 96, 97, supra, where defendants' motions for judgment were granted, and the court said (pp. 62-63) that there was no " 'showing that (Texaco's) lease cancellation affected interstate commerce in any degree.' "

CONCLUSION

We respectfully submit that the judgment is correct and should be affirmed.

Dated: San Francisco, California, October 23, 1963.

MOSES LASKY
Attorney for Respondent

(Appendix follows)

Appendix

STATUTES INVOLVED IN ADDITION TO THOSE QUOTED IN APPENDIX A TO PETITIONER'S OPENING BRIEF

McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. § 45(a)(2) and (3):

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

California Fair Trade Act, Cal. Bus. & Prof. Code:

§ 16900. **Short title.** This chapter may be cited as the Fair Trade Act.

§ 16901. **Producer; commodity.** As used in this chapter:

(a) "Producer" means grower, baker, maker, manufacturer or publisher.

(b) "Commodity" means any subject of commerce.

§ 16902. **Contracts fixing sale price; exception.**

(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at price stipulated by the vendor.

(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

(b) Such provisions in any contract imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

§ 16903. **Commodities sold through vending equipment.** All the provisions of this chapter extend to any commodity sold through vending equipment, if such vending

equipment bears the trade-mark, brand or name of the producer or owner of the commodity and if the commodity is in fair and open competition with commodities of the same general class produced by others.

§ 16,904. **Cut-price sales; unfair competition.** Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§ 16,905. **Exclusions.** This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

California Petroleum Labeling Act, Cal. Bus. & Prof. Code:

§ 20840. **Sale, etc., of petroleum products from unlabeled containers, etc., unlawful: Viscosity rating: Determination: Containers with net content of gallon or less.** It is unlawful for any person to sell, offer for sale, assist in the sale of, permit to be sold or offered for sale, or deliver or offer for delivery, any gasoline, distillate, kerosene, or any oil represented as lubricating or motor oil for internal combustion engines, at any place where petroleum products are kept or stored for sale, unless and until there is firmly attached to or painted upon each container, receptacle, pump, and inlet end of the fill-pipe of each underground storage tank, from which or into which such gasoline or oil is drawn or poured out for sale or delivery, a sign or label plainly visible consisting of the word or words in letters not less than one-half of an inch in height, 'gasoline,' 'distillate,' 'kerosene,' 'lubricating oil' or 'motor oil,' as the case may be, together with the brand, trade-mark or trade name of such product * * *.

§ 20849. Filling of tanks, pumps, containers, etc., with, or delivery of, product other than indicated by brand, trademark, etc. It is unlawful for any person to deposit or deliver, or authorize to be deposited or delivered, into any tank, pump, container or receptacle, or into any bottle or bottles kept in a basket, stand or rack, at any place where petroleum products are kept or stored for sale, any gasoline or other motor fuel, or any distillate, kerosene, lubricating oil or motor oil, other than that indicated by the brand, trademark, trade name, and in the case of lubricating oil or motor oil, the S.A.E. classification number, displayed on the tank, pump, container, receptacle, bottle, basket, stand or rack, or the inlet end of the underground storage tank, except as provided in this chapter.

§ 20850. Same: Connection of pump, etc., bearing particular label with receptacle containing another product. Subject to the provisions of this chapter relating to tank vehicles, it is unlawfuf for any person to attach or connect, or cause or permit to be attached or connected, any pump, container or other device, used for or in the drawing, pouring, or delivery of any petroleum product referred to in this chapter, and intended for sale, to or with any tank or receptable containing any petroleum product or any liquid other than the one described on the label, tag or sign attached or affixed to such pump, container or other device.

§ 20851. Same: Delivery of product other than that indicated by label on pump, etc. Subject to the provisions of this chapter relating to tank vehicles, it is unlawful for any person in making any sale, to pump, draw, furnish or deliver, or to cause or permit to be pumped, drawn, furnished or delivered, by means of, or through, any pump or other device, any product other than the one described on the label, tag or sign attached or affixed to such pump or other device.

Cal. Civil Code § 2026. FACTOR, WHAT. A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser.

Cal. Civil Code § 2027. OBEDIENCE REQUIRED FROM FACTOR. A factor must obey the instructions of his principal to the same extent as any other employe, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

[redacted]

[redacted]

[redacted]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

I

ARGUMENT

I. RESPONDENT HAS REPHRASED THE ISSUES AND FAILED TO SUPPORT THE JUDGMENT BELOW.

A. THE DOCTRINE OF "CONSENT" WAS THE BASIS OF THE AFFIRMANCE OF THE DISTRICT COURT JUDGMENT, NOT THE VALIDITY OF UNION'S CONSIGNMENT SCHEME.

1. The Issues of the Instant Appeal Involve Unlawful Means and Methods, and the Use of Consignment to Regiment the Judgments of Independent Retailers.

Respondent has attempted to rephrase the issues of the instant appeal under its heading, Questions Presented (Respondent's Brief, pp. 2-4). The issues in the instant case, however, do not involve the legality of consignment in the abstract. The issues rather concern Union's particular consignment agreement; the purpose with which it was promulgated and used;

the use of the agreement to prevent competition as to prices among all the dealers; the effect of the consignment system in establishing uniform and non competitive prices based on what Union's competitors were charging the public; the means used to police the consignment prices; and the use of the consignment system to regiment and oppress independent dealers.

The respondent can fare no better under "consignment" than can a supplier with a suggested price policy. The antitrust laws have not been held to invalidate a single supplier's suggestion of resale prices as an announcement to the trade, but when the supplier utilizes means and methods which compel dealer obedience to price orders it violates the Sherman Act. "Consignment" can not be used as the obvious means of compelling uniform and non-competitive prices among those in business for their own risk. *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. 1963 Trade Reg. Rep., Para. 16,422. Consignment does not prevent judicial inquiry to determine if it is being utilized as an instrument of oppression.

Respondent can not point to a voluntary cooperative acceptance of its retail price fixing consignment agreement but determined to rely on unlawful tie-in. Union Oil determined not to allow the dealer freedom to renounce consignment. Instead it conditioned lease occupancy and continuance of the dealer's business on the acceptance of the respondent's price orders and gasoline deliveries under its consignment agreement (R. 277-278). It threatened dealers with such loss if price orders were not obeyed (Answer, para.

17, R. 93). Thus the record shows the regimentation of otherwise free and independent retailers by Union by means and methods held coercive. *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280 (1951). The opinion of the United States Court of Appeals for the Ninth Circuit, of course, does not support the use of such means by a powerful gasoline company, and assumed that Union was in violation of the Sherman Act. It relied, rather, on the tort doctrine of "consent". The respondent does not support this affirmative defense, but seeks to sustain the judgment on other grounds.

It is respectfully urged that the doctrine of "consent" is inapplicable here and that there are no legal bars to petitioner's action for damages based on the destruction of petitioner's business by respondent because he refused to obey price orders.

II. THE ARGUMENT OF RESPONDENT DOES NOT MEET THE ISSUES AND FACTS OF THE CASE.

A. SUMMARY JUDGMENT CANNOT BE SUSTAINED FOR THE RESPONDENT.

1. The Record Shows That Respondent's Consignment System Was Used to Enforce Uniform and Non-Competitive Prices in Interstate Commerce Among Independent and Competitive Dealers Whose Free Exercise of Business Judgments Was Subject to Coercive Tie-in, Threats of Non-Renewal of a One Year Lease, and Non-Renewal of the One Year Lease Because of the Non-Acceptance of Price Control; That Petitioner's Lease Was Not Renewed Because He Set Prices at Market Level Against the Threats of Respondent.

Petitioner shall attempt to reply to the points raised by respondent, as set forth in its Summary of the Argument, Respondent's Brief, pp. 24-31.

The instant appeal stems from the view of the district court below that the case was one which should be decided by the appellate courts based on the concessions of the respondent (R. 413; 426-427; 435). Firstly, the parties were urged to arrive at an agreed statement (R. 377-378). Then, the court urged that the plaintiff file a pre-trial statement, upon which the defendant could admit the facts and a review obtained (R. 399). Respondent turned its back on this procedure and instead noticed the deposition of the plaintiff (R. 452). Respondent then moved for summary judgment (R. 298), and during the hearing, the district court was of the view that plaintiff should file a motion for partial summary judgment on the issue of liability and that the appellate courts should decide the issues of law involved (R. 413; 426-427). It was expressly stated that the plaintiff in filing his motion for partial summary judgment could make use of every contention and use the full record (R. 435).

Thus, the first point of respondent's argument, the ripeness of the case for summary judgment (Respondent's Brief, p. 24), that plaintiff has gambled on an all or nothing basis, is in error. Petitioner made a motion for partial summary judgment on the issue of liability under the direction of the district court without waiving his right to a trial by jury (R. 337-338).

Petitioner has, however, urged at all times that the stipulations of the defendant created liability as a matter of law under the *per se* doctrine. Price fixing arrangements, both vertical and horizontal, are *per se* illegal. *White Motor Co. v. United States*, 372 U.S.

253, 260 (1963). The stipulations were made by counsel for respondent because he knew that there were no alternatives available to him; the respondent did business in the manner stipulated. Thus each stipulation is corroborated by documentary evidence.

1. Purpose of the consignment program was to fix prices.	R. 223-224; 231-232, 233, 247-248.
2. Illegal tie-in.	R. 276-277; 277-278.
3. Threats of lease non-renewal.	Answer, R. 93, para. 17, and see R. 277-278, 77-78.
4. Respondent would only issue the one year lease.	R. 213-214; R. 277-278.
5. Non-renewal because of dealer's setting price of own judgment.	Answer, para. 18, R. 93. Consignment changes; R. 77-78; 286. Policing prices; R. 247-248. ". . . we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business" (R. 277-278).

It is respectfully urged that these are ultimate facts which create liability under the Sherman Act's prohibition against vertical price fixing by coercion.

It is noted that respondent still continues to insist that it may use the renewal of a one-year lease as a club to perpetuate price control.

Respondent's Brief states, at page 76:

> "Simpson's other point of attack is the supposition—also stipulated as a fact for the purposes of Union's motion—that Union would not give a

new lease to one who had violated a consignment agreement, i.e., to one who, after obtaining gasoline from Union to handle as its agent, violated his instructions."

But even if there are issues of fact to be tried on liability, plaintiff below is entitled to a trial by jury. *F. H. McGraw & Co. v. New England Foundation Co.* (1st Cir., 1954) 210 F.2d 62; *Wallin v. Richmond Screw Anchor Co.* (2nd Cir., 1946) 154 F.2d 780; *Garrett Biblical Institute v. American University,* (D.C. Cir., 1947) 163 F.2d 265; *Lloyd v. Franklin Life Insurance Company* (9th Cir., 1957) 245 F.2d 896; *Brawner v. Pearl Assurance Company* (9th Cir., 1959) 267 F. 2d 45.

B. THE FOURTH CIRCUIT, UPON THE SECOND APPEAL IN OSBORN v. SINCLAIR REFINING COMPANY, HAS HELD THAT MAJOR GASOLINE COMPANIES ARE LIABLE FOR DAMAGES WHEN LEASES OF DEALERS ARE CANCELLED (ALTHOUGH CANCELLED PURSUANT TO THE TERMS OF THE LEASE) IN THE ENFORCEMENT OF A COERCIVE PROGRAM WHICH RESTRAINS TRADE.

1. The Arguments Advanced by Union to This Court Were Rejected by the Fourth Circuit.

It is respectfully urged that the recent opinion of the United States Court of Appeals for the Fourth Circuit, *Osborn v. Sinclair Refining Co.,* decided November 4, 1963 ..... F.2d ....., C.C.H. 1963 Trade Cases, Para. 70,940; BNA Antitrust and Trade Regulation Report, No. 122, November 12, 1963, completely rejects the contentions of the respondent in this appeal. The learned court in *Osborn* held that a service sta-

tion dealer whose lease has been terminated because he did not follow the orders of his lessor and supplier which were made pursuant to an unlawful tie-in program had been injured and that he was entitled to damages under the Clayton Act to compensate him for the loss of his service station business.

As to the district court's ruling that the dealer was not entitled to damages arising from the cancellation of a year to year lease, the court of appeals stated, pp. 78,746-78,747:

> "There is no justification in antitrust law or in the general law of damages in limiting recovery to losses sustained before the break in business relations. Where the customer is cut off in a coercive attempt to further a forbidden arrangement for a 'fenced off market,' Northern Pac. R. Co. v. United States, 356 U.S. 1, 11, 12 (1958), he is entitled to recover all damages issuing from that punitive action. To deny him this would eviscerate section 4."

The *Osborn* opinion held that the *Colgate* doctrine did not sanction the termination of business relations in order to pressure a supplier's dealers to adhere to an unlawful program and that *Colgate* could not be used to prevent recovery of damages to a dealer subjected to such pressure.

The court stated, p. 78,747:

> "There is no indication in *Parke, Davis*, or in any other case, that these principles regarding refusals to deal vary, depending upon whether there is a monopoly or concerted action with co-

conspirators, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, irrespective of monopoly or conspiracy, if the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by *Colgate.*"

In holding that a right to cancel a lease for lawful purposes was not a shield to liability when used by a single supplier to further arrangements in restraint of trade, the court stated, p. 78,748:

". . . On the other hand, no case has been cited to us, and our research has revealed none, holding that a refusal to deal may be immune in spite of the fact that the seller has violated the antitrust laws and that the refusal to deal was in furtherance of that violation. The cases are unanimously to the contrary. They show without exception that damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws, whatever form of trade restraint the arrangement takes. Although most, but not all, of these cases did in fact involve monopoly or conspiracy, as opposed to non-monopolistic or non-conspiratorial arrangements in restraint of trade, the courts made absolutely nothing of such distinction."

It is respectfully submitted that Union Oil can fare no better than did Sinclair under the respondent's claims of "consignment", "public utility regulation",

"no conspiracy",[1] and the fixing of lease terms by the courts. The Sherman Act subjects producers to liability when it uses means that go beyond a simple announcement of policy and disinclination to sell in order to secure adherence to a price maintenance scheme. *Osborn v. Sinclair Refining Co.*, supra, at p. 78,744; *United States v. Richfield Oil Co.*, supra; *Federal Trade Commission v. Atlantic Refining Co.*, supra.

C. THE RESPONDENT HAS AVOIDED THE TEACHINGS OF THE MASONITE CASE.

1. The Sherman Act Is Concerned With the Purpose and Effect of Consignment Schemes.

The respondent's next contention, that its price fixing scheme is saved because it uses consignment, fails to discuss the *Masonite* case. But this Court made it abundantly clear in *Masonite* that the *General Electric* case was not a holding that agency devices could be used to hide price fixing schemes. This Court there stated, 316 U.S. 265, at 280:

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[1]Respondent, however, cannot claim that "conspiracy" was not made an alternative theory of liability by petitioner. At R. 419-420, petitioner's counsel made clear that the record justified the finding that Union Oil Company "was compelling a combination in restraint of trade among the dealers and itself." Counsel then filed his Motion for Partial Summary Judgment, predicating liability on alternative theories, including the finding of conspiracy. See R. 339, 340, 343. The district court acknowledged this, at R. 350. But compare with R. 354. After the filing of the district court's opinion, petitioner filed "Plaintiff's Objections to Entry of Judgment in Summary Judgment Proceedings", R. 361. The failure of the court to find "conspiracy" or to permit further proof thereof was urged as error (R. 363-364).

> "So far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."

The citation to *United States v. Standard Oil Company*, C.C.H. 1959 Trade Cases, Para. 69,399, is not relevant. This consent judgment purports to be judgment which has not adjudicated the practices alleged to be unlawful in the complaint. It involved a horizontal conspiracy to monopolize by the respondent Union Oil Company of California and six other major integrated oil companies. These companies were alleged to have conspired to monopolize the marketing of refined petroleum products in the Pacific States Area (California, Oregon, Washington, Nevada and Arizona). (C.C.H. The Federal Antitrust Laws, With Summary of Cases Instituted By the U. S., 1890-1951, No. 1024, p. 398.)

An injunction which is based on a consent settlement cannot become a basis to determine legality. The consent judgment did not purport to adjudicate facts, let alone questions of law arising from the activities of the individual participants to that conspiracy to monopolize after the date the government's complaint was filed. The United States indeed took pains to allow it to attack the activities of the individual defendants. See Paragraph XVI (B), Final Judgment, 1959 Trade Cases, Para. 69,399 at p. 75,534.

D. UNION'S CONSIGNMENT AGREEMENT HAS FAILED TO FOLLOW THE STANDARDS OF THE GENERAL ELECTRIC CASE.

1. The Dealer Assumed Risks of Price Decline.

Respondent next urges that *General Electric* case supports its consignment agreement. The Respondent's Brief, however, admits the sham nature of the consignment agreement itself. It states that a test of purchase and sale is, at p. 53:

> "A purchaser is liable for the agreed purchase price, which is determined at the date of the delivery of the goods to him, and he remains liable even though its value falls before he sells it."

But under respondent's scheme, the retail dealer shouldered the burden of price decline in the same manner as did the purchase and sale dealer. This was the admitted intent and purpose of the respondent. (R. 72).

This letter of April 15, 1958, in referring to "amount of dealer margins" manifestly refers to a purchase and sale "margin". Thus, in order to equate the consignment commission with a purchase and sale margin, the respondent simply did away with guaranteed commissions. The Union dealer absorbed the decline in price as would a purchase and sale "margin" dealer. As the retail price declined, so did his margin, just as in a purchase and sale transaction. (R. 82-85) If retail prices went up, his margin was increased.

Further, there was no guarantee, at any time, of a commission for handling and storage apart from sales of gasoline. The dealer would receive nothing if he did not sell Union's gasoline. Thus when petitioner was ordered to raise his price 2¢ over market prices, he was being ordered to lose income, although his handling and storage burdens were the same regardless of sale. The loss of gallonage sale meant the loss of income. But gasoline and TBAs were his major source of income. Unlike the ordinary hardware store retailer acquiring General Electric bulbs on consignment, he did not have many other products to dispense. But Union did not assume the risks of price decline. Until March 1, 1958 Union determined that the dealer absorb 50% of the decline in retail prices (subject to a guaranteed commission, which in turn was based on gasoline sales (R. 100). After March 1, 1958 the respondent's dealers were to be required to absorb price declines between deliveries of gasolines without guaranteed commissions (R. 281, 284, 76, 81-85).

This is contrary to the *General Electric* plan wherein General Electric did not place any risk of price decline on the dealer. Indeed, the dealer could return the stock. Here the dealer's livelihood is dependent on a gallonage sold of a commodity dumped into underground tanks and not readily returnable.

Argument is made that the agreement obligated the dealer to pay for the gasoline on the basis of accounting for proceeds when received (Respondent's Brief, p. 14). But respondent did not do business in this manner. It demanded payment for gasoline when

delivered, for the delivered gasoline, not the sold gasoline. It ceased to read the meters to determine the dealer's prior sales. This is clearly stated by Mr. Rath at R. 170-171. Thus all attempts to base payment on sales were eliminated and the dealer paid for the delivered gasoline. The Federal Trade Commission has described the situation in the favor of petitioner. In *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. Trade Reg. Rep., Para. 16,422, at page 21,289:

> "A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and the sum was put into escrow. *When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.*" (Emphasis added.)

2. Union Oil Did Not Carry All Applicable Insurance.

Respondent asserts that the requirement that the dealer carry insurance to cover damage or destruction to the gasoline by others, in consistent with General Electric's plan. But in the General Electric plan the company paid whatever insurance is carried. Union, on the other hand, provided in its consignment agreement that the dealer maintain personal liability and property damage insurance (R. 97).

There is a clear distinction between provisions designed to provide for efficient handling of merchandise and provisions which require the dealer to pay for insurance or be liable for the retail price. Union expressly required the so-called agent to cover these matters at his risk (Para. 4, 5, 6; R. 96-98).

Whereas the General Electric dealer was responsible for the merchandise consigned to him, here Union required the dealer to cover all ordinary risks (Id.).

3. Other Risks of Title Were on the Dealer.

All taxes save property taxes were paid by the dealer. The risks of shrinkage or evaporation were on the dealer and Union made no effort to allow compensation for such losses to the gasoline to which it claimed title.

The statement in *Federal Trade Commission v. Atlantic Refining Co.*, supra, p. 21,289 is fully applicable here:

> "Dealers continued to operate their businesses after entering consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold at retail as before."

B. THE McGUIRE ACT IS IRRELEVANT TO THE INSTANT CASE.

It is no defense to a charge of vertical price fixing that the producer could have fair traded. This Court has made it clear that the Miller-Tydings Act and McGuire Act are exceptions to the Supreme Court's prohibitions against resale price fixing and will not be construed to grant exemptions apart from following the statutory procedures. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) at 310:

> "The question before us is whether the price-fixing agreements challenged herein move along that route [the Miller-Tydings Act]. If they do not, they are illegal *per se*. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The District Court was plainly in error in attempting to create a category of agreements which are outside the exemption of those Acts but which should nevertheless be spared from application of the *per se* rule."

But the respondent argues that even though its consignment program was resale price fixing it should be considered exempted. But under *McKesson & Robbins*, this argument is invalid and unsupportable. The Answer of respondent attempts to claim Miller-Tydings only prior to May, 1955, not thereafter. (Para. 11, R. 91). Thus the Miller-Tydings Act was not an issue and could not become one.

But even assuming not, the consignment scheme here cannot possibly be said to be "fair trade". The scheme of respondent went interstate into states that have held the non-signer clause unconstitutional. Washington: *Remington Arms Co. v. Skaggs, et al.*, 55 Wash. 2d 1, 345 P. 2d 1085; Oregon: *General Electric Co. v. Wahle*, 207 Or. 302, 296 P. 2d 635. In Utah, the Fair Trade Act was held unconstitutional. *General Electric Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P. 2d 741. Further, some of the states provide for minimum price fixing only. Montana, Revised Codes, 1947, Title 85, Chap. 2, Sec. 85-202; Oregon, Revised Statutes, Title 50, Chap. 646, Sec. 646.340. The federal courts will not support an unlawful interstate scheme.

Respondent could not in California "fair trade" under the consignment scheme here because: (1) Not one dealer knew of fair trading; a prerequisite to state sanction;[2] (2) No single uniform price was made applicable to all dealers in the trade (R. 251, 256, 257, 277, 282, 283, 74-77); (3) Union controlled prices of lessee dealers who were in competition with purchase and sale Union dealers not under consign-

[2]See the recent opinion of the United States Court of Appeals for the Ninth Circuit, *Amedio Girardi v. The Gates Rubber Company Sales Division, Inc.*, decided November 21, 1963, ___ F. 2d ___; slip opinion, p. 13, footnote 11:

"No contention is made that Gates is protected under the minimum resale price proviso of § 1 of the Sherman Act because of the California Fair Trade Act (California Business and Professions Code, §§ 16900-16905). Such contention could not be made for there is no allegation or proof that Gates had any minimum price agreement of the kind there referred to. . . ."

ment (R. 333); (4) Union controlled the prices of lessee dealers in competition with off-brand dealers who had been supplied Union gasoline in large quantities by Union (R. 334-336), and (5) Union controlled the prices of lessee dealers in competition with stations operated or controlled by Union itself (R. 447, 333). These facts would preclude any statutory exemption. *United States v. McKesson & Robbins, Inc.*, supra.

The "uniform" price referred to by petitioner in his opening brief was "uniform" from respondent's view, not the view of a fair trade law. Thus Union follows the retail prices of Standard Stations, Inc. (R. 281-284; 72-76). These Standard Oil prices may, in the market place, require Union dealers to post many different prices in a small trading area within a city (R. 231-232; 247-248). This would not be tolerated in California or any fair trade state. *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 66 Misc. 342, 2 N. Y. 2d 320 (1938).

The respondent did not intend to "fair trade", it could not "fair trade" even if it desired to, and the McGuire Act is inapplicable. Its attempted usage here is beyond authority. The assertion of "fair trade" only points out how far removed respondent's consignment scheme was from legality.

F. RESPONDENT ACQUIRED CONTROL OVER THE BUSINESSES OF 3,000 INDEPENDENT RETAILERS BY PREDATORY MEANS.

Respondent attempts to defeat the proof of violation of Section 2 of the Sherman Act, by resort to syllogism. It urges that since it could lawfully own and operate its own stations, it therefore can adopt means and methods which have the same effect as single ownership. The syllogism is absurd. It would follow under this logic that since one may have had a lawful monopoly, therefore all predatory attempts to obtain a monopoly are lawful. The fallacy is that the manner in which one obtains a monopoly is decisive for a Section 2 violation.

When a company the size and strength of Union intends to acquire control over the business judgments of independent businessmen who have invested heavily in their business ventures; and this intention is effectuated by resort to the coercive use of illegal tie-in, threats to, and the non-renewal of short term leases, fashioned for such a purpose, an attempt to monopolize occurs. *United States v. Aluminum Co. of America* (2nd Cir., 1945) 148 F. 2d 416, approved *American Tobacco Co. v. United States*, 328 U. S. 781 (1946). The violation of Section 2, occurs precisely in the resort to predatory practices of threat, coercion and use of leases as weapons to compel obedience. These means are unlawful and when used to control the judgments of 3,000 independent businessmen in 8 western states, a violation of Section 2 occurs.

G. CONSIGNMENT CONTEMPLATES EXCLUSIVE DEALING.

The contentions of the respondent denying the exclusive dealing requirements of the consignment system through its consignment agreements are strained and illogical. As was stated in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, at 354-355 (1922):

> "The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force."

The *Sinclair* case, 261 U. S. 463, is inapplicable here because Union was not leasing its pumps, it was leasing the service station. *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U. S. 293, at 303-304 (1949).

The respondent urges that petitioner has confined its claim of exclusive dealings to the sole fact that the record showed that all the Union consignee dealers in California sold only Union gasoline. While the effect of a program intended to restrain trade in gasoline products and prices is decisive, *United States v. Masonite Corporation*, supra, the respondent did not correctly state the record. Respondent's Brief

at page 20 claims to correctly quote the petitioner's counsel at R. 432, but it omits the statement:

> "Mr. Keith. *The basic facts*, as I say, you get admissions in the trial from the witness, and so on . . ." (Emphasis added)

At R. 434, petitioner's counsel made it abundantly clear that he was relying on the entire record.

Petitioner's counsel stated:

> "Mr. Keith. Well, all the papers plus that fact, I think, would raise the judicial conclusion there was such a policy."

All the papers, it is respectfully submitted, show as follows:

(a) The consignment agreement provides that the dealer maintain Union trade marks on his, the dealer's facilities (R. 95).

(b) The retail dealer consignment agreement system was a determined, comprehensive program and scheme by which Union determined to fix the prices of Union's gasoline at retail gasoline service station sites.

(c) The purpose to maintain fixed and uniform prices equal to or above Standard Stations, Inc. would be defeated by sales of other gasolines by the dealers.

(d) The lease provides that the dealer or lessee cannot make alterations or changes in the service station or any part thereof without Lessor's prior consent (Para. 6, R. 82). Respondent had told the

district court that the dealers were not free to repaint the service stations (R. 434-435).

(e) The avowed defense of respondents was that it desired to have sales of Union gasoline made by fiduciary agents who would thus be required to be loyal to Union and its products.

(f) The proven effect of the scheme showed that consignment dealers did not handle competitive lines of gasolines (R. 336-337).

The claim of "state labeling law" puts the cart before the horse. For this act only applies after a choice of product is made. Respondent made the choice for the independent lessee.

H. IT IS COERCION TO USE THE THREAT OF CANCELLATION OF A LEASE OR NON-RENEWAL OF A SHORT TERM LEASE TO DEPRIVE DEALERS OF FREEDOM OF CHOICE.

The *Richfield* case, which is a Section 1 of the Sherman Act case as well as a Section 3 of the Clayton Act case, is controlling on the matter that Union had coerced the dealers. Union could not control the dealer's free judgments as to prices and products by using the non-renewal of a one year lease. The case of *United States v. General Motors Corp.* (7th Cir., 1941) 121 F.2d 376, further, clearly taught that suppliers could not use such means to enforce price fixing orders. The instructions of the trial court in the *General Motors* case, printed in *Ford Motor Co. v. United States*, 335 U.S. 303, at 316, et seq., dis-

tinguished between exposition, persuasion, argument and coercion. As to the latter, it stated:

> "He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer."

Richfield, of course, made it abundantly plain that lease non-renewal could not support arrangements which restrain trade. To do so would constitute coercion on the dealer. See also *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. Trade Reg. Rep., Para. 16,422, p. 21,286; *Osborn v. Sinclair Refining Co.*, supra.

I. THERE WAS ILLEGAL TIE-IN.

It is clear that the consignment agreement related first to gasoline delivered by Union, and that it then fixed the prices of this gasoline that the dealer would charge to the public. Union's price fixing arrangements, then, related to a product, gasoline, and to the supplying of the product to the dealer by Union. The conjunction of the lease and the retail dealer consignment agreement constituted unlawful tie-in. *United States v. Richfield Oil Corp.*, supra; and *Osborn v. Sinclair Refining Co.*, supra.

J. SIMPSON SUFFERED ACTIONABLE DAMAGES.

1. Simpson Was Coerced Under the Threat of Lease Nonrenewal Into Following Prices While a Dealer.

The respondent urges that it did not compel Simpson to charge authorized prices. This, however, ignores the record of the means and methods used by it to enforce authorized prices. The discussion of respondent, then, ignores the record of coercion, and the teachings in the *Richfield* and *Osborn* cases.

2. The Colgate Case Does Not Permit a Supplier to Escape Liability for Refusing to Renew or Cancelling the Leases of Those Who Refuse to Abide by Orders Made Pursuant to an Unlawful Arrangement.

The cases cited by respondent to support its claim that no actionable damages can be claimed by petitioner stemming from the loss of his business, do not support the proposition.[3] The issue is not whether an agreement exists between the parties, but whether respondent used the threat of and the nonrenewal

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[3]Reference is also made by respondent to the judgment for unlawful detainer in the Superior Court of the State of California. Again, this reference is immaterial to this action under the federal antitrust laws. The action for unlawful detainer was occasioned by Simpson's staying on under the provisions of the temporary restraining order of the United States District Court for the Northern District of California in San Francisco (R. 547). Plaintiff had left the station on June 5, 1958 (R. 321). Thus on June 17, 1958 a default judgment was entered. It is entirely inaccurate to claim *res judicata*. A default judgment is not conclusive, in a subsequent suit on a different cause of action, against any defenses the defendant may have, since there was no trial or hearing, and it cannot be said that such matters were adjudicated. 29 Cal. Jur. 2d, Judgments, § 235. Of course, the federal courts have exclusive jurisdiction to hear and determine the claim of violation of the antitrust laws and award damages under Section 4 of the Clayton

of one year leases to require the abdica[redacted]ree judgments as to prices and products. Since petitioner's business was lost to him as a result of the exercise of his free judgments, and the consignment system of Union violated the Act, his right to damages is assured as a matter of judicial enforcement of the Sherman Act. The second opinion in *Osborn v. Sinclair Refining Co.*, supra, distinguishes the cases cited by respondent, and holds contrary to respondent's position. The Fourth Circuit has ruled that the acceptance of respondent's position would vitiate Section 4 of the Clayton Act. It stated, p. 78,746:

> "If a seller, who is not a monopolist and who does not act in concert with co-conspirators, nevertheless is able to coerce buyers into a combination or arrangement whereby prices are fixed, or the sale of one product is tied to the sale of another, or dealing is required to be exclusive, and if that seller could refuse to deal with buyers unwilling to adhere to the unlawful arrangement

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Act. *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).

Restatement of Judgments, § 71, states:

"Where a court had incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter [redacted]"

Rest[redacted]udgments, § 71, comment c, states:

"T[redacted]e stated in this Section is applicable where the State court has incidentally determined a matter which the federal courts alone have jurisdiction to determine."

This is especially so in an unlawful detainer action since it is a special statutory action designed to provide for quick and drastic possession of property. 30 Cal. Jur. 2d, Landlord and Tenant, § 348. The defendant is usually unable to counterclaim or cross-complain, Id., §374. Extrinsic defenses which may be covered in another action such as fraud or coercion are not allowed, Id., § 366.

without answering for the resulting losses, the effectiveness of the section 4 treble-damage suit as an enforcement measure would be to a great extent nullified."

III. THE CONSIGNMENT PROGRAM WAS IN INTERSTATE TRADE AND COMMERCE

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911);

United States v. Richfield Oil Company, 99 F. Supp. 280 (1951), affirmed 343 U.S. 922;

United States v. General Motors Corp. (7th Cir., 1941) 121 F.2d 376;

Federal Trade Commission v. Atlantic Refining Co., C.C.H. 1963 Trade Reg. Rep., Para. 16,422;

Federal Trade Commission v. Sun Oil Co., C.C.H. 1963 Trade Reg. Rep., Para. 16,418;

Osborn v. Sinclair Refining Co. (4th Cir., 1960) 286 F.2d 832; 207 F. Supp. 856; rev'd ___ F.2d ___; C.C.H. 1963 Trade Reg. Rep., Para. 70,940.

II

CONCLUSION

It is respectfully urged that the Court hold upon the record before it that the retail dealer consignment agreement program is void under Sections 1 and 2 of the Sherman Act, and that the cause be remanded solely on the issues of damages suffered. Or, in the alternative, that the judgment below be reversed and the case ordered to trial on all issues.

Dated, San Francisco, California,
December 13, 1963.

Respectfully submitted,

MAXWELL KEITH,
Attorney for Petitioner.

PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA

Petition of Union Oil Company of California for Rehearing

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RICHARD S. SIMPSON, *Petitioner,*

vs.

UNION OIL COMPANY OF CALIFORNIA

Petition of Union Oil Company of California for Rehearing

Respondent Union Oil Company of California respectfully petitions for a rehearing pursuant to Rule 58 on the following grounds:

1. It is not clear from the Court's opinion whether Union's consignment arrangement is held to be illegal because the Court holds it to be not truly a consignment but instead a sale and purchase with resale price maintenance. Several portions of the opinion seem to indicate that it is the Court's view that the system is not truly consignment at all but a subterfuge, viz., (a) footnote 10, p. 10, and statements on page 7; (b) the fact that the word "consignment" is almost invariably put in quotation marks as if to question the correctness of the usage; and (c) denial that the arrangement can be called an "agency" (p. 8). But *if* this is the

basis of the decision, then we respectfully submit that *Union is entitled to a jury trial to determine whether the arrangement is truly a consignment*, as everyone called it, or a mere subterfuge; a summary judgment against Union denies Union its constitutional right to a jury trial. On the other hand, if in the Court's view some admitted fact irrefutably prevents the agreement from being a consignment, then proper guidance to those needing it calls for identification of the crucial element.

2. If the Court accepts the consignment arrangement as indeed a *true* consignment, but nevertheless holds it to be illegal, then the opinion leaves obscure what elements make the arrangement illegal. The opinion affirms that "consignments perform an important function in trade and commerce" (p. 4) and concedes that a single consignment, as of a painting or other work of art, binding the consignee to sell at a given price, is legal and enforceable (pp. 5 and 8). What, then, is the invalidating element? Is it the number of consignees? The opinion speaks of "a vast gasoline distribution system" and "many retail outlets" (p. 8). But if the illegalizing element is number of consignees, how many? Businessmen anxious to obey the law will be left in a quandary by the opinion. If it is illegal to use consignment at a large number of *retail* stations, is it legal or illegal to do so with a small number of *wholesale* distributors? Its use on the wholesale level is well nigh universal in the petroleum industry and much commoner in all industry than on the retail level. At what point of numbers of outlets where consignment is used is the line between legality and illegality crossed? And should not this be a question of fact for a jury to decide after the Court lays down some standards of factual pertinence?

3. Or is the illegalizing element the fact of "coercion". The opinion seems to read so, for it notes that the *Parke Davis* case precludes the use of coercion (p. 2), and it refers to Union's system as a "coercive 'consignment' device" (p. 9) and concludes,

"we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws" (p. 11). If the illegalizing element is coercion, then what is the fact or set of facts which the Court conceives to be "coercion"? Is it merely the supposed fact that when a prospective lessee sought to lease property from Union, Union in stating the terms upon which it would lease included the fact that it would lease only to a consignee? (R. 387). Or is some other fact or facts essential to constitute coercion? If the former, we submit that it is strange usage to denominate it "coercion" for one party to a solicited consensual arrangement to state the terms upon which he will deal. But, *either* way, whether this *mere* fact is held to constitute the coercion or something more is required, we *submit that Union is entitled to a jury trial of the issue.* If something more is required, then the existence of the *something more* has not yet been tried or determined by any fact-finding body. If mere refusal to lease to a non-consignee is coercion, then whether Union did so refuse in the case of Simpson is also a question of fact to be tried. Months after Simpson became a lessee Union's policies were still in process of formation (R. 277-8). The case was *not tried* below on a stipulated set of facts; it was not tried at all (R. 402, 404). While for the purposes of Union's own motion for summary judgment (R. 349, 396), it stipulated that it would not lease to a non-consignee, this it did on the submission that so far as *its motion* was concerned the fact was irrelevant. Union did not intend to so stipulate for any other purpose; nothing said in the pre-trial ought to be so construed; or if it should be, Union should be permitted to seek from the trial court relief from the stipulation. If the existence of the fact is relevant, then it should be tried. It is one thing to reverse a summary judgment for Union on holding its legal theory to be unsound under the "rule * * * we [the Court] announce today" (p. 12); it is quite another to direct a summary judgment of *violation* against Union on an assumption of facts that trial may negative. *Fountain v. Filson*, 336 U.S. 681.

4. If coercion constitutes the illegalizing element, does the rule announced by the Court illegalize Union's consignment arrangement with the numerous retailers who do *not* lease from it and choose consignment for the security it affords? As footnote 1 of the opinion states, there were 1327 nonlessee-retailers. The opinion gives no guidance to those needing and seeking it.

5. Union's consignment system was recognized and accepted by the Department of Justice in the 1959 Consent Decree in *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399, p. 75,522, et seq. In the prolonged negotiations leading up to that decree the history, origin, motivations and purposes of Union's consignment arrangement were presented to the Department. On Union's motion for summary judgment in the present case this material did not come into the record. We respectfully submit that Union should be allowed on a trial of the cause to offer the same data before its consignment system can be declared illegal.

6. Apart from questions of legality of the consignment arrangement, there is the question what type of damage claimed by Simpson is the actionable damage. While the opinion states that Simpson suffered actionable damage, it leaves obscure *what* it is that constituted actionable damage, for Simpson asserted two distinctly different types of damage. One was for inability to fix his prices while he was a dealer, and the other was for refusal of Union to give him a new lease. It has long been held, in an unbroken line of cases, that, absent conspiracy or monopolization, one cannot be held in damages to another for refusal to deal with him, whatever the reason for the refusal, even though it be a failure of the latter to participate in an agreement said to be unlawful. This Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468, 469 adumbrated a question about this but left the question open. Does the Court now close the question by holding that there is liability in the circumstances mentioned? If so, we respectfully submit that this question is even more impor-

tant than the question of the legality of consignment, and that the law, the bar, and business deserve an exposition of reasons for setting aside what has been accepted for so many years as elementary. This question is being presented to the Court in a different context by a petition for a Writ of Certiorari to the Ninth Circuit in *Tidewater Oil Co. v. Paul Lessig*, which will be filed concurrently with the present petition for rehearing. It would seem useful to consider the two together.

7. Moreover, if it is the Court's holding that a unilateral, non-monopolistic refusal of a lessor to renew a lease inflicts an actionable wrong under the antitrust laws on the former lessee where the motive and reason for the refusal were the failure of the lessee to adhere to resale prices, *then there is the major issue of fact* whether Union's refusal to renew Simpson's lease was his failure to observe resale prices. It is true that Union so stipulated, but it did so solely for the purposes of its own motion for summary judgment (R. 349), and at the request of the trial court that it eliminate "other strings to its bow" so as to get a clear issue on Union's motion (R. 381). Union did not intend to so stipulate and did not stipulate for any other purpose. We submit that, *if the fact is relevant, then the whole issue should be returned to a jury.*

8. The Court's opinion concludes with the statement,

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

But this leaves unstated who is to determine the existence of the "equities". Is it to be the jury on a trial of this case? Or, since determination of equities is normally not within the province of juries, is it to be the trial judge? Or must the case return to this Court for determination of the equities? If it is to be returned to this Court, then we respectfully submit that the equities should

be determined now unless their determination rests upon facts not before the Court. If the equities limiting recovery of damages prospectively lie in the fact that until this Court's decision consignment was universally recognized as legal under the *General Electric* case, then the issue can now be decided. But if other facts are pertinent, we respectfully submit that the Court's opinion should give guidance as to what facts the parties and the trial court are to examine in order to enable a court to determine the existence of the equities.

9. Union's consignment system is confined to its *branded, trademarked* gasoline. The Court's opinion (p. 11) distinguishes *United States v. General Electric*, 272 U.S. 476 on the basis that its *ratio decidendi* is shown on p. 485 to be the patent laws. The discussion at page 485 was in answer to a contention that there the consignment system was monopolistic. The Court rejected this as irrelevant because a patentee's monopoly of the patented article is legal. But this Court has also said that the power "manufacturers have over their own trademarked products is not the power that makes an illegal monopoly", *United States v. Du Pont & Co.*, 351 U.S. 377, 393. Or if patents are relevant to the question, Union is entitled to a trial to show that patents are involved in its gasoline.

For the reasons stated above, we respectfully submit that a rehearing should be granted.

Dated: May 8, 1964.

MOSES LASKY
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I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MOSES LASKY